Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. McKINNIE, ET AL., PETITIONERS,

vs.

TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE, MIDDLE DIVISION

PETITION FOR CERTIORARI FILED JUNE 3, 1964
CERTIORARI GRANTED OCTOBER 12, 1964

SUPREME COURT OF THE UNITED STATES

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IN THE

CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO

No. 15866

STATE OF TENNESSEE,

v.

LESTER G. McKINNIE, JOHN R. LEWIS, FREDERICK LEONARD, JOHN JACKSON, JR., NATHAL WINTERS, FREDERICK HARGRAVES, HARRISON DEAN, and ALLEN CASON, JR.

MINUTE ENTRY OF GRAND JURY REPORT—
December 12, 1962

Thereupon the Grand Jury for Davidson County, Tennessee, came into open court and after being regularly called presented the following bills of indictments and presentments which are in the following words and figures, to wit:

Copy of indictment follows:

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge

[fol. 9]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION TWO

PRESENTMENT—December 12, 1962

The Grand Jurors for the State of Tennessee, duly elected, impaneled sworn, and charged to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present:

That Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., heretofore, to wit, on the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms, in the County aforesaid, unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, in the following manner and by the following means, to wit:

On the day and date aforesaid, and for many months and years prior thereto, the said Burrus and Webber Cafeteria, Inc., had built up and established a restaurant and cafeteria, elaborately furnished and equipped, known as the B & W. Cafeteria, located at said address in the heart of the business, commercial and uptown district of Nashville, Tennessee, in a building fronting on the east side of 6th Avenue North, and extending back to the westerly margin of an alley in the rear, which dining room and cafeteria had two long cafeteria lines, dining tables and chairs on the ground level and additional dining tables and chairs on the mezzanine level, with a large seating capacity for customers, patrons and clientele of said B & W. Cafeteria, which had established itself by reputation as serving fine foods, and which said cafeteria daily served hundreds of white patrons, customers and clientele.

[fol. 10] The entrance from said 6th Avenue North into said cafeteria is effected by a double door at the northwest corner of said cafeteria, which leads into a vestibule, small in area, with a second set of double doors on the east side of said vestibule; all customers of said cafeteria enter and leave through said vestibule.

The owners of said cafeteria and restaurant, which was privately owned, had established a rule that they would receive, admit and serve only such persons as customers, patrons and clientele as said corporation elected to admit,

receive and serve in said cafeteria; and said Burrus and Webber Cafeteria, Inc., had reserved the right to control the access and admission or exclusion of persons to said cafeteria as the owners deemed proper, in their discretion as the owners of private property; and under the provisions of Section 62-710 of the Code of Tennessee, the owners of said cafeteria reserved the right not to admit and to exclude from said cafeteria any person the owners, for any reason whatsoever, chose not to admit or serve in said cafeteria.

Among the rules established by the owners of said B & W Cafeteria was one that they would serve food only to persons of Caucasian descent, or white persons, and not to serve food to persons of African descent, or colored persons; and said B & W Cafeteria was known to the general public as a cafeteria and dining place, privately owned, serving food only to white persons.

In the said City of Nashville at said time there were numerous other dining rooms, restaurant, cafeterias and places serving food, some of which served food only to colored persons, and some serving food to both white and colored persons, known as "integrated" restaurants, dining rooms, cafeterias and food places, many of which were in the immediate vicinity or within a few blocks of said B. & W. Cafeteria, all of which was then and there well known to the [fol. 11] defendants, hereinbefore named; and on said October 21, 1962, food was available to said defendants at numerous eating places in Nashville in the general vicinity of said B & W Cafeteria.

The said defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., are persons of African descent or colored persons; and said defendants unlawfully, wilfully, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to conduct what is known as "sit-in" affairs, by going to divers restaurants, dining rooms and cafeterias in Nashville, Davidson County, Tennessee, serving only white persons food, to enter said dining rooms, restaurants and cafeterias well knowing that only white persons were being or would be served, and further well knowing that colored persons would not be served

food therein; and after being denied entrance thereto and after being denied food service, and after being requested to leave such dining rooms, restaurants and cafeterias, the said defendants did conspire to block the entrance or vestibule of said B & W Cafeteria to prevent customers, patrons or clientele from entering, and to block or prevent those already therein and who had been served food and had finished their meals from leaving said cafeteria by means of the only regular entrance or exit thereto, being the above described vestibule, all being contemplated to be done, well knowing that their presence as "sit-ins" was likely to promote disorders, breaches of the peace, fights or riots by patrons, customers and clientele of such segregated cafeteria;

And the said defendants, on said October 21, 1962, well knew that prior or similar acts of "sit-in" in Nashville had resulted in fights, breaches of the peace, disorders, brawls and riots previously, requiring the calling of police and peace officers to quell conditions resulting therefrom, as at least one of the defendants herein named had previously participated in several of such "sit-ins" conducted at other dining rooms and restaurants in Nashville prior to October 21, 1962.

[fol. 12] The said defendants are college students and are strong advocates of an integration movement now being conducted in Davidson County, Tennessee, and are engaged in a movement to coerce, compel, and to intimidate owners of restaurants, dining rooms and cafeterias serving only white persons to "integrate", or to admit and serve food to persons of African descent or colored persons against the wishes, rule and established policy of the owners of such segregated restaurants, dining rooms and cafeterias.

As an overt act in the furtherance of said unlawful conspiracy, on Sunday, October 21, 1962, shortly after noon, when the said B & W Cafeteria was engaged in serving food to numerous customers, patrons, and clientele, and while many persons were coming in and out of said cafeteria, the said defendants did assemble at a point near said cafeteria, and then as a group did go to the 6th Avenue door of said cafeteria, and did enter into said vestibule, with intent to get through the second doors of said vestibule,

and to enter one of the serving lines within said cafeteria in an effort to obtain food and service therein;

At said door the owners of the B. & W. Cafeteria had placed a guard to prevent such "sit-in" movement; said guard was compelled to block the further entrance at the second door; whereupon said defendants did form a block within said vestibule, preventing customers and patrons from either entering from the street or from coming out of said cafeteria after finishing their meals; and said conspirators did further attempt to force their way inside the main cafeteria sections, did push around and shove white patrons therein, which conduct continued for a period of more than thirty minutes during one of the busiest hours of business at said cafeteria; and as a further overt act in the furtherance of said conspiracy, said defendants did refuse to leave said vestibule and cafeteria when requested and demanded by proper officers and employees of said cafeteria.

[fol. 13] During said period of time so spent by said defendants in said vestibule, said defendants knowingly, deliberately and intentionally did place said B & W. Cafeteria and the persons lawfully therein in excitement, turmoil and confusion; the orderly conduct of the business of said cafeteria was greatly upset, disrupted and obstructed; numerous persons gathered within and without said cafeteria by reason of said acts and conduct of the defendants, which said defendants then and there well knew were calculated to produce disorder, breaches of the peace, confusion, brawls and turbulent and riotous conduct, and which was done by said defendants with a view to commit acts injurious to the business of the B & W Cafeteria, its trade and commerce, which was injured therefrom;

Contrary to the form of the statutes in such cases made and provided, in violation of Section 39-1101 of the Code of Tennessee, and against the peace and dignity of the State of Tennessee.

[fol. 23]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MOTION OF DEFENDANTS TO QUASH PRESENTMENT—
Filed January 10, 1963

Come the defendants and move the Court for an order quashing the presentment and dismissing this cause, for the following reasons:

1. Because the State of Tennessee, through its judicial officers in their official capacities are trying to enforce a policy of racial discrimination, same being in violation of rights protected under the Fourteenth Amendment of the United States Constitution.

2. Because the acts relied on by the State arising under Section 62-711 of the Code of Tennessee, do not refer to the exclusion of persons of designated race or color since such designation would not be in harmony with the provision of the Fourteenth Amendment of the United States Constitution and if so interpreted, could not be enforced by the State or any of its officials acting in their official capacities.

3. Because the acts charged in the third and fourth paragraphs or any paragraph or parts of the presentment do not constitute a criminal act.

[fol. 24] 4. Because the presentment does not allege or show that the defendant conspired to do an unlawful act or that they conspired to do an unlawful act in an unlawful manner.

5. That the rights relied upon by the defendants are individual and personal rights created by the Due Process and Equal Protection Clauses of the Fourteenth Amendment and a denial thereof cannot be enforced by the State

or any person acting in an official capacity as representative of the State.

Wherefore, defendants move the Court for an order quashing the presentment and dismissing this cause.

Looby & Williams, By Z. Alexander Looby, Attorneys for Defendants.

[File endorsement omitted]

[fol. 25]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MOTION UNDER ADVISEMENT—January 10, 1963

Came the Attorney General who prosecutes for the State and the defendants in person.

Thereupon this cause was heard by the court upon defendants' motion to quash or dismiss the presentment in this cause, upon the evidence introduced and after argument of counsel for the State and the defendants, said motion was by the court taken under advisement.

It is therefore considered by the court that this cause be set upon the docket on January 14, 1963 for final disposition. Mr. Z. Alexander Looby, Attorney for the defendants.

Mr. Harry G. Nichol, District Attorney General.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 27]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

ORDER OVERRULING MOTION TO QUASH PRESENTMENT—
January 15, 1963

Came the Attorney General who prosecutes for the State and the defendants in person.

Thereupon this cause was heard by the court upon defendants' motion to quash or dismiss the presentment entered against them, which motion was by the court taken under advisement on January 10, 1963.

It is therefore considered by the court that said motion be overruled and that this cause be put upon the docket for arraignment at a later date, to which action of the court the defendants by their attorney made an exception.

Mr. Z. A. Looby, Attorney for the defendants.

Mr. Harry G. Nichol, District Attorney General.

Ordered that court stand adjourned until tomorrow morning nine o'clock.

John L. Draper, Judge.

[fol. 28] [File endorsement omitted]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

[Title omitted]

MOTION OF DEFENDANTS TO QUASH PRESENTMENT, ETC.—
Filed January 30, 1963

Come the defendants and move the Court to quash the presentation heretofore returned against them or, in the alternative, to require this State to make an election because the presentment purports to charge the defendants with violating Code Section 39-1101-(7) and Code Section 62-711, all under and in the same count, same being bad for duplicity.

Therefore, the defendants move the Court to quash their indictment or in the alternative to require the State to elect whether it will prosecute the defendants under Code Section 39-1101-(7) or whether it will prosecute them under Code Section 62-711.

Looby & Williams, By Z. Alexander Looby, Attorneys for Defendants.

Certificate of Service (omitted in printing).

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 29] [File endorsement omitted]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

No. 15866

[Title omitted]

ORDER OVERRULING MOTION TO QUASH PRESENTMENT—
February 1, 1963

This cause came on to be heard upon the motion of the defendants, heretofore filed in this cause, to quash the presentment returned against them for the reason that the presentment was duplicitous in that it charged the defendants with a conspiracy to violate two sections of the Code in the same count of the presentment.

After hearing the matter and argument of counsel, both for the State and for the defendant, and the presentation of the law applicable, the Court is pleased to over-rule the motion of the defendants by authority of Section 40-1818 of T.C.A. and the holding of our Supreme Court in the case of State vs. Smith in Vol. 194 at Page 608.

To this action of the Court in over-ruling their motion to quash the presentment, the defendants excepted.

This the 1st day of February, 1963.

John L. Draper, Judge.

[fol. 30]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MINUTE ENTRY OF ARRAIGNMENT—PLEA—February 1, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, who being arraigned upon said indictment plead not guilty to the same; thereupon this cause was continued until a later date of the present term of this court.

Mr. Z. Alexander Looby and Mr. Avon Williams, Attorneys for the defendants.

Mr. Harry G. Nichol, District Attorney General for the State.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 31]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MINUTE ENTRY—5 JURORS SELECTED, SPECIAL VENIRE ORDERED; RESPITED—March 5, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, who being arraigned upon said indictment plead not guilty to the same and for their trial put themselves upon the country and the Attorney General doth the like.

Thereupon, the court proceeded to the impaneling of the jury, when the following were duly and regularly elected and impaneled, to wit: Howard C. Lewis, C. P. Holland, Joe W. Slate, Harley C. Dean and William Rawls.

And it appearing to the court that the jury was incomplete and the panel exhausted, it is ordered by the court that the jury box be brought into open court as provided by law, and that 100 names be drawn therefrom, as provided by law, and that venire facias issue to the Sheriff of Davidson County, Tennessee to summon said venire to appear before the Judge of this court tomorrow morning at 9:00 o'clock which has been done.

[fol. 32] Thereupon the 5 jurors heretofore impaneled and elected were placed in charge of Mr. Dewey Norman, a regular officer of this court, who was duly sworn as the law directs to take charge of and wait upon said jury until finally discharged by the court.

Mr. Z. Alexander Looby and Mr. Avon Williams, Attorneys for the defendants.

Mr. Harry G. Nichol and Mr. Gale Robinson, Attorneys Generals for the State.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 33]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MINUTE ENTRY—3 JURORS SELECTED, SPECIAL VENIRE ORDERED, RESPITED—March 6, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, also the 5 jurors heretofore impaneled in this cause who were on yesterday respited from the further consideration of the cause on trial until

the meeting of court today, came here into open court in charge of their sworn officer in whose charge they were placed on yesterday.

Thereupon the court proceeded in the further impaneling of the jury when the following were duly and regularly elected and impaneled, to wit: O. H. Glasgow, Herbert Amic and Willie D. Swindle.

And it appearing to the court that the jury was incomplete and the panel exhausted, it is ordered by the court that the jury box be brought into open court as provided by law, and that 100 names be drawn therefrom, as provided by law, and that venire facias issue to the Sheriff of Davidson County, Tennessee to summon said venire to appear before the Judge of this court tomorrow morning at 9:00 o'clock, which has been done.

[fol. 34] Thereupon the 8 jurors heretofore impaneled and elected were placed in charge of Mr. Charles R. Hill, a regular officer of this court, who was duly sworn as the law directs to take charge of and wait upon said jury until finally discharged by the court.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 35]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MINUTE ENTRY—JURY COMPLETE, PORTION OF PROOF; RESPITED—March 7, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, also the 8 jurors heretofore impaneled in this cause, who were on yesterday respited from the further consideration of the cause on trial until the meeting of court today, came here into open court in charge of their sworn officer, in whose charge they were

placed on yesterday. And the court proceeded to complete the impaneling of the jury when the following were duly and regularly elected and impaneled, to wit: William T. Moon, Charles H. Williams, H. J. Farnsworth and Wendell H. Cooper.

It then appearing to the court that the jury was complete, the jury was duly sworn to well and truly try the issues joined, and true deliverance make according to the law and evidence and after hearing a portion of the proof and there not being time on today to conclude the trial the jury was [fol. 36] respited from the further consideration of the cause on trial until the meeting of court tomorrow morning at 9:00 o'clock, and the jury was placed in charge of Mr. Paul Startup, a regular officer of this court, who was duly sworn as the law directs to take charge of and wait upon said jury until finally discharged by the court.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 37]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

MINUTE ENTRY—PORTION OF PROOF, RESPITED—
March 8, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, also the jury heretofore impaneled in this cause who were on yesterday respited from the further consideration of the cause on trial until the meeting of court today, came here into open court in charge of their sworn officer in whose charge they were placed on yesterday, and renewed their consideration of the cause on trial and they having heard the further portion of the proof and there not being time on today to conclude the trial the jury was again respited from the further consideration of the cause on trial until tomorrow

morning at 9:00 o'clock and the jury was placed in charge of Mr. John Ed Polk, a regular officer of this court who was duly sworn as required by law, to take charge of and wait upon said jury until finally discharged by the court. Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 38]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

VERDICT—March 9, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, also the jury heretofore impaneled in this cause who were on yesterday respited from the further consideration of the cause on trial until the meeting of court today, came here into open court and renewed the consideration of the cause on trial, and they having heard the remainder of the proof, argument of counsel and charge of the court, aforesaid, upon their oath aforesaid, do say: That they find the defendants guilty of unlawful conspiracy.

Thereupon the jury was discharged.

It is therefore considered by the court that the judgment of the court be reserved until a later date.

Mr. Z. Alexander Looby and Mr. Avon Williams, Attorneys for the defendants.

Mr. Harry G. Nichol and Mr. Gale Robinson, District Attorney Generals for the State.

Ordered that court stand adjourned until Monday morning at nine o'clock.

John L. Draper, Judge.

[fol. 39]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

JUDGMENT—March 19, 1963

Came the Attorney General who prosecutes for the State and the defendants in person.

Heretofore, the defendants Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., were found guilty of conspiracy to violate Section 39-1101-(7) of the Code in this cause by a jury on Saturday, March 9, 1963, and the judgment of the court was reserved until this date, at which time the verdict of the jury was made the judgment of the court.

It is, therefore, considered by the court that the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., for their offenses of a conspiracy to violate Code Section 39-1101-(7) shall pay a fine of $50.00 each together with the costs of this prosecution [fol. 40] and each defendant shall be confined in the County workhouse for a period of 90 days commencing on the date of their delivery to the keeper thereof, subject to the rules and regulations of said Institution.

That they pay the costs of this prosecution or that they, by their labor, pay the same at the rates of labor allowed by law, subject to the rules and regulations of said Institution.

Thereupon the defendants by their attorney gave notice to the court of a motion for a new trial and said attorney is allowed 30 days within which time to prepare and file said motion.

Mr. Avon Williams and Mr. Z. Alexander Looby, Attorneys for the defendants.

Mr. Harry G. Nichol and Mr. Gale Robinson, Attorneys General for the State.

(Charge of the Court Copied in Bill of Exceptions)

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 41]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE
DIVISION TWO

No. 15866

[Title omitted]

MOTION FOR NEW TRIAL—Filed April 18, 1963

Come the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., and move the Court thereon in the above entitled cause, and to grant them a new trial upon the following grounds:

1. The Court erred in overruling the individual motions filed by each of said defendants on 17 December 1962 for an order remanding the cause to the Court of General Sessions to be acted upon by a Judge of said Court.

2. The Court erred in overruling defendants' motion filed on 18 January 1962 for an order quashing the presentment and dismissing the cause on the grounds stated therein.

3. The Court erred in overruling defendants' motion field on 30 January 1962 to quash the presentment or, in the alternative, to require the State to make an election as to which of the State statutes alleged in the indictment it would prosecute the defendants under.

4. The satutes under which defendants were arrested, charged in the presentment, tried and convicted, are unconstitutional on their face by purporting to make it a crime to conspire "to commit any act injurious to public health, public morals, trade, or commerce" (T. C. A. Section 39-1107(7)), or to be guilty of "turbulent or riotous con-
[fol. 42] duct within or about any hotel, inn, theater, or

public house, common carrier, or restaurant" (T.C.A. Section 62-711), in that said statutes do not define the type of conduct therein prohibited with sufficient particularity to apprise defendants or give them warning of the offense alleged, nor do said statutes contain sufficient standards of guilt or definition of the offenses created thereby upon which judicial determination of guilt could be made, all of which renders said statutes so vague, indefinite and uncertain as applied to defendants and the evidence offered against them in this case as to violate their rights under the due process clause of the Fourteenth Amendment to the United States Constitution.

5. That one of the statutes charged in the presentment and upon which defendants were convicted (T.C.A. Section 62-710), is not and does not purport on its face to be a criminal statute, and the criminal conviction of the defendants for an alleged violation of this statute violates their rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.

6. The Court erred in charging the jury as follows:

"Section 62-710 of the Code of Tennessee provides as follows: The rule of the common law giving the right of action to any person excluded from any hotel or public means of transportation or place of amusement is abrogated, and no keeper of any hotel or public house or carrier of passengers for hire except railway, street, interurban and commercial, or conductors, drivers or employees of such carrier, or keeper, shall be bound or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry or admit to his house, hotel, vehicle, or means of transportation or place of amusement, nor shall any right exist in favor of any such person so refused admission. The right of such keepers of hotels and public houses, carriers of passengers and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to

be as complete as that of any private person, private house, vehicle, or private theater, or places of amusement for his family . . .

[fol. 43]

• • • • • • • •

You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101-(7), Code Section 62-710 and Section 62-711, in that they did unlawfully commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber, Cafeteria, Inc., a corporation located at 223 —uh, 226 Sixth Avenue, North, Nashville, Davidson County, Tennessee . . .

• • • • • • • •

. . . if you find and believe, beyond a reasonable doubt, that the said defendants unlawfully, willfully, knowingly, deliberately and intentionally did unite, combine, conspire, agree and confederate between and among themselves to violate Tennessee Code Sction 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of the Burrus and Webber Cafeteria, Inc., a corporation located at 226 Sixth Avenue, Nashville, Davidson County, as charged in this presentment, then it will be your duty to convict the defendants, provided that they, or one of them, did in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement, that is, if you find that said agreements and acts in the furtherance of said objective was done in Davidson County, Tennessee . . ."

This was error because said Code Section 62-710 was not included in the presentment does not create or purport to create any criminal offense and the criminal charge, trial and conviction of defendants thereunder upon said charge of the Court violates their rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.

7. T. C. A. Sections 39-1101(7), 62-710 and 62-711, are unconstitutional and void on their face as applied to the defendants on the presentment and evidence in this case in that said statutes are being applied as state law authorizing and enforcing a rule, custom and practice of racial segregation or discrimination in facilities licensed by the State, open to the public, and invested with a public interest, thereby violating rights of the defendants secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

8. The arrest, trial and conviction of the defendants upon the presentment, evidence and the charge of the Court [fol. 44] in this case was expressly predicated upon, and for the sole purpose of, enforcing a private rule, practice or custom of racial segregation for the benefit of the Burrus and Webber Cafeteria, Inc., which actions of state executive and judicial officers and agencies and the resulting convictions of defendants are unconstitutional and void as violating rights of defendants secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

9. The Court erred in denying that portion of Defendants' Special Request No. 1 for Instructions to the Jury, which was as follows:

> "Evidence that the defendants agreed to seek entry, or that they went to the premises and sought entry, to the B&W Cafeteria for the purpose of being served food, could not constitute such an unlawful agreement or overt act in pursuance thereof even though the defendants were Negroes and the B&W Cafeteria had a policy of refusing to serve food to Negroes, for. . . ."

10. The Court erred in denying Defendants' Special Request No. 2 for Instructions to the Jury, which was, in words and figures, as follows:

> "DEFENDANTS' SPECIAL REQUEST NO. 2
> FOR INSTRUCTIONS TO THE JURY
>
> If you should find from the evidence that the defendants went to the B&W Cafeteria, a place of business

offering meals to the general public, and sought to enter there for the purpose of purchasing and being served meals, and that said Cafeteria or its agents blocked their entry in pursuance of an for the purpose of enforcing, a rule of the Cafeteria to serve only white persons and not to serve Negroes, and that the defendants remained standing in a peaceable manner where they were when the Cafeteria blocked their entrance, either for the purpose of still seeking admission to the Cafeteria, or for the purpose of peaceably protesting the Cafeteria's policy of racial exclusion or segregation, then you could not find the defendants guilty of committing any unlawful act, nor could you find defendants guilty of a conspiracy or agreement to commit any unlawful act under this evidence, and this is true even though you also find from the evidence that it was necessary for some white patrons to pass through or around the defendants in order to gain ingress or [fol. 45] egress to or from the Cafeteria or that some prospective white patrons may have been reluctant or may have refused, to enter, stay in, or come out of the restaurant because of the defendants' presence there."

11. The Court erred in denying Defendants' Special Request No. 3 for Instructions to the Jury, which was, in words and figures, as follows:

"DEFENDANTS' SPECIAL REQUEST NO. 3
FOR INSTRUCTIONS TO THE JURY

You will not consider or bring in any verdict as to that portion of the presentment which charges a conspiracy by defendants to violate Code Section 62-711, for the reason that the State has abandoned this portion of the charge, and has offered no evidence in support thereof."

12. The Court erred in denying Defendants' Special Request No. 4 for Instructions to the Jury, which was, in words and figures, as follows:

"DEFENDANTS' SPECIAL REQUEST NO. 4
FOR INSTRUCTIONS TO THE JURY

Notwithstanding T. C. A. Code Section 62-710, or any statute or other law of the State of Tennessee, the B&W Cafeteria, or its proprietors, have no legal right to exclude persons from said business, offering food service and meals to the general public, solely on account of the race or color of the persons so excluded, or to enforce or have enforced, any private rule or policy of racial segregation or exclusion through criminal action in a Court of the State of Tennessee; for any State law which attempts or attempted to establish such a legal right, and any action of State agencies, including the Courts thereof, in enforcing, directly or indirectly such a private rule or policy, would be and is unconstitutional and void as depriving the defendants in this case of the equal protection of the laws and of due process of law as secured by the Fourteenth Amendment of the Constitution of the United States."

13. The evidence offered against defendants, all Negroes, in support of the presentment charging them with conspiracy to violate Code Section 39-1101-(7) and Code Section 62-711, establishes that they and each of them were at the time of arrest and at all times covered by the [fol. 46] charge or presentment, in peaceful exercise of constitutional rights to assemble with others for the purpose of speaking and protesting against the practice, custom, usage and rule of racial discrimination in Burrus and Webber Cafeteria, 226 Sixth Avenue, North, Nashville, Tennessee, an establishment performing an economic function invested with the public interest; that defendants peacefully were attempting to obtain service in the facilities of said Cafeteria in the manner of white persons similarly situated, and at no time were defendants or any of them defiant, in breach of the peace, or guilty of any turbulent or riotous conduct or acts injurious to trade or commerce, and were at all times upon an area essentially public, wherefore defendants, by their arrest, trial and conviction under said State statutes and through action of state officers and

the state court have been denied rights secured by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

14. The evidence establishes that prosecution of defendants was procured for the purpose of preventing them from engaging in peaceful assembly with others for the purpose of speaking and otherwise peacefully protesting in public places the refusal of the preponderant number of restaurants, facilities and accommodations open to the public in Nashville, Tennessee, to permit the defendants, all Negroes, and other members of defendants' race from enjoying the access to such restaurants, facilities and accommodations afforded members of other races; and that by this prosecution and conviction of defendants, the prosecuting witnesses, arresting officers and State District Attorney General have employed the aid of state officials and of the Court to enforce a racially discriminatory policy contrary to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the [fol. 47] United States.

15. The defendants, all Negroes, were tried and convicted by a jury composed entirely of white persons in the City of Nashville, Davidson County, Tennessee, an area in which racial segregation has been imposed by state law in virtually all aspects of public life for many years, and which is still the public and private custom and practice of nearly all white people in said area. The express and sole purpose of the presentment and trial of defendants in this case was to enforce through state action a private rule and practice of racial discrimination against defendants and all other Negroes, maintained by Burrus and Webber Cafeteria, a restaurant open to the general public in Nashville, Tennessee. The State's Attorney deliberately and systematically challenged and excused all Negro veniremen who were called as prospective jurors. All white veniremen who were called and accepted by the State admitted their personal practice, custom, philosophy and belief in complete racial segregation in virtually all aspects of their social existence. It was therefore impossible for defendants to secure a fair and impartial jury of their peers on the

presentment in this case, and they were thereby deprived of their rights secured by Article 1, Section 9 of the Constitution of Tennessee and by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

16. The Court erred in holding that jurors Wm. T. Moon and Wendell H. Cooper were competent, and in requiring defendants to accept said jurors over protest, the defendants having exhausted all of their challenges, because all of these jurors admitted their personal practice, custom, philosophy, indoctrination and belief in complete racial segregation and discrimination against Negroes, as being a group inferior to white persons, in virtually all aspects [fol. 48] of their social existence. The sole and express purpose of the presentment and trial of defendants in this case was to enforce through state executive and judicial action just such private rule and practice of racial discrimination against defendants and all other Negroes, maintained by Burrus and Webber Cafeteria, a restaurant open to the general public in Nashville, Tennessee, as to which all of said jurors, being white persons, admitted their said personal indoctrination, custom, prejudice and belief. The State's Attorney deliberately and systematically challenged and excused all Negro veniremen who were called as prospective jurors. Defendants were thereby deprived of their rights to a fair and impartial jury of their peers, in violation of Article 1, Section 9 of the Constitution of Tennessee and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. The Court overruled defendants' motions that said jurors be disqualified for cause upon the foregoing grounds, to which action defendants excepted.

17. The Court erred in holding that the juror, Herbert Amic, was competent, and in requiring defendants to accept said juror and seating said juror over protest, because he admitted that he would start out in the case with a prejudiced attitude toward the defendants where the presentment alleged or the proof showed that they went to the Burrus and Webber Cafeteria and sought to be served knowing that the cafeteria had a rule discriminating against Negro

patrons, and he admitted his personal belief, opinion and prejudice in favor of such a rule. The Court overruled defendants motion that said juror be disqualified for cause upon the foregoing ground, to which action defendants excepted. Defendants were thereby deprived of their rights to a fair and impartial jury of their peers, in violation of Article 1, Section 9 of the Constitution of Tennessee and in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the [fol. 49] United States.

18. There was no evidence upon which the jury could find the defendants guilty of the offense charged in the presentment.

19. All of the evidence preponderated in favor of the innocence and against the guilt of defendants of the offense charged in the presentment.

20. The judgment of the Court fixing the punishment of defendants in words and figures as follows:

"ORDER

"Came the Attorney General who prosecutes for the State and the defendants in person.

Heretofore, the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., were found guilty of conspiracy to violate Section 39-1101-(7) of the Code in this cause by a jury on Saturday, March 9, 1963, and the judgment of the Court was reserved until this date, at which time, the verdict of the jury was made the judgment of the Court.

It is, therefore, considered by the Court that the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., for their offenses of a conspiracy to violate Code Section 39-1101-(7) shall pay a fine of $50.00 each together with the costs of this prosecution and each defendant shall be confined in the County Workhouse

for a period of 90 days commencing on the date of their delivery to the keeper thereof, subject to the rules and regulations of said institution.

That they pay the costs of this prosecution or that they, by their labor, pay the same at the rates of labor allowed by law subject to the rules and regulations of said institution. Thereupon, the defendants, by their attorney, gave notice to the Court of a motion for a new trial and said attorney is allowed 30 days within which time to prepare and file said motion.

This the 19th day of March, 1962.

/s/ John L. Draper
John L. Draper, Judge"

is contrary to the verdict of the jury, which was in words and figures as follows:

The Court: The Jury is all present. Gentlemen of the jury have you agreed upon a verdict?

Foreman: We have.

The Court: What is it?

Foreman: We agreed your Honor, on a fine less than $50, so we find the defendants guilty."

[fol. 50] Said judgment of the Court therefore deprives defendants of rights secured by the due process clause of the Fourteenth Amendment to the Constitution of the United States.

Wherefore, the defendants move the Court to set aside and vacate the verdict of the jury and the judgment thereon and grant them a new trial.

Looby & Williams, By Z. Alexander Looby, Solicitors for Defendants.

Proof of service (omitted in printing).

[File endorsement omitted]

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 53]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

Unlawful Conspiracy

ORDER OVERRULING MOTION—May 10, 1963

Came the Attorney General who prosecutes for the State and the defendants in person.

Thereupon this cause was heard by the court on May 3, 1963, upon defendants' motion to be granted a new trial, which was by the court taken under advisement until this date, on which date said motion was by the court overruled. It is therefore considered by the court that the defendants Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., for their offenses of a conspiracy to violate Code Section 39-1101-(7) shall pay a fine of $50.00 each together with the costs of this prosecution and each defendant shall be confined in the County Workhouse for a period of 90 days commencing on the date [fol. 54] of their delivery to the keeper thereof, subject to the rules and regulations of said Institution.

That they pay the costs of this prosecution or that they by their labor pay the same at the rates of labor allowed by law, subject to the rules and regulations of said Institution. To the judgment and ruling of the court in overruling defendants' motion for a new trial, the defendants except and pray an appeal in the nature of a writ of error to the next term of the Supreme Court sitting at Nashville, which is by the court granted and the defendants are allowed 30 days from this date within which time to prepare and file their Bill of Exceptions.

Mr. Z. A. Looby and Mr. Avon Williams, Attorneys for the defendants.

Mr. John K. Maddin, Special Prosecutor for the State.
Mr. Harry G. Nichol, District Attorney General for the State.

Mr. Gale Robinson, Assistant Attorney General for the State.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

* * * * * * *

[fol. 63]
IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

[Title omitted]

BILL OF EXCEPTIONS FILED—May 31, 1963

Came the Attorney General who prosecutes for the State and the defendants in person, who by their attorneys tender this their bill of exceptions to the judgment of the court in overruling defendants' motion for a new trial, which was by the court signed, sealed and ordered made a part of the record.

Ordered that court stand adjourned until tomorrow morning at nine o'clock.

John L. Draper, Judge.

[fol. 64] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1] [File endorsement omitted]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

No. 15866

In the Matter of:

STATE OF TENNESSEE,

v.

LESTER G. McKINNIE, JOHN R. LEWIS, FREDERICK LEONARD, JOHN JACKSON, JR., NATHAL WINTERS, FREDERICK HARGRAVES, HARRISON DEAN, and ALLEN CASON, JR.

DEFENDANTS BILL OF EXCEPTIONS

including

Voir dire

Before: Hon. John L. Draper, Judge and A Jury.

APPEARANCES:

For the State:

Harry Nichol, Gale Robinson, Howard F. Butler.

For the B&W Cafeteria:

Jack Maddin.

For the Defendants:

Z. Alexander Looby, Avon Williams, Jr.

[fol. 2]

. . . . . .

The above-styled cause came on for trial before Hon. John L. Draper, Judge, and a Jury on March 5, 1963, in the Criminal Court of Davidson County, Tennessee, Part II, when the following proceedings were had, to-wit:

. . . . . .

COLLOQUY

The Court: All right, gentlemen, we are ready to begin picking a jury.

Mr. Looby: If your Honor please, the Defendants respectfully request the privilege of waiving the jury and want to be tried by the Court, without a jury.

Mr. Nichol: If your Honor please, the State will insist upon a jury. If the state waives the jury, any fine to be assessed by the Court alone is limited to $50. The statute says in cases of this kind for a jury to assess as high as $1,000.

Mr. Looby: If your Honor please, I object to the Attorney General making a speech now. This is no time to make a speech about waiving the jurors. This is no time to make a speech.

Mr. Nichol: I am saying we do not want to waive a jury.

Mr. Looby: I am addressing the Court.

The Court: General, does the State—

Mr. Nichol: We decline to waive the jury.

The Court: All right. Then the case will be tried before the jury. This will settle it.

[fol. 3] Mr. Looby: If the Court please, we respectfully except to the Court's ruling.

The Court: All right. Call in a prospective juror.

Mr. Looby: If the Court please, we want to call them as individuals, and then have individual examination.

The Court: I said a prospective juror.

(A. L. DICKERSON is brought in to be examined) (sworn by clerk).

Criminal Court Clerk: Have you formed or expressed an opinion as to the guilt or innocence of the Defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winters, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., who are charged with violating Code §39-1101, unlawful conspiracy?

A. No.

The Court: He is competent.

Mr. Nichol: Mr. Dickerson, do you know any of these Defendants here?

A. No, sir.

Q. The charge here is that they violated Code Section §39-1101-7. It charges that they unlawfully conspired to obstruct trade and commerce of the business of the B&W Cafeteria. Do you know any of the facts of that case?

A. No, sir.

Q. I will ask you if you go into that jury box, is there any reason why you cannot apply to the facts the law of Tennessee as given you by the Court in this case? Is there [fol. 4] any reason or conscientious scruples against the present laws of Tennessee on this subject?

A. (Hesitates.)

The Court: Do you understand his question?

A. No, sir. I did not.

Mr. Nichol: In other words, what has been your business over the years, Mr. Dickerson?

A. Pardon?

Q. What's been your business over the years?

A. Bowling alley business.

Q. What?

A. Bowling alley business.

Q. Do you own a bowling alley, or where is it located?

A. 8th and Church.

Q. 8th and Church? Is there any reason in the world why you can't—that you know, that you can't hear the evidence in the courtroom and apply to that the law of Tennessee, as given to you by the Court, and give both the State and the Defendants a fair and impartial trial?

A. Yes, sir.

Q. We accept Mr. Dickerson.

Mr. Looby: Mr. Dickerson, you say you operated a bowling alley at 8th and Church?

A. Yes, sir.

[fol. 5] Q. And it was open to the public, was it?

A. Yes, sir.

Q. Open to anybody regardless of their race?

A. No.

Q. You were segregated?

A. You could say so.

Q. Well, did it exclude Negroes?

A. Pardon?

Q. Did you exclude Negroes?

A. Yes, sir.

Q. That is the case that is involved here. This is a case involving the exclusion of Negroes. Could you give these men in this case a full and fair and impartial trial?

A. I think so.

Q. If you have a place open to the public and they should come there and attempt to come in, would you consider it an obstruction of your trade and commerce?

A. The place is not there any more.

Q. Sir?

A. The place is not there any more, it has been sold and moved out.

Q. But if they came there, would you consider it an obstruction of trade and commerce?

A. Yes.

Q. And, feeling the way you do, do you think you could give these men a fair and impartial trial, based on your [fol. 6] opposition?

A. I think so.

Q. I think this juror shows prejudice and bias, and we should pass him because of the very questions he's decided.

The Court: Well, he answered to the contrary, Gentlemen, and the Court can't search a juror apart.

Mr. Looby: But he says, if your Honor please, he is not operating any business, but he objected to that in a business. And that's all this case is about.

Juror: I would have to object, or close up.

Mr. Looby: Sir?

Juror: I would have to object, or close up.

Q. And you would object?

A. Yes, sir.

Q. You would have to object?

A. Yes, sir.

Q. And you would have to close if you didn't?

A. I would be forced to close if I let him come in at that time.

Q. And this case is about—this case is about the B & W Cafeteria, and they went to the B & W Cafeteria, and went in for service, and were arrested because of that, solely because of their race. Don't you think you would be somewhat prejudiced against them?

A. Do I think what?

[fol. 7] Q. Don't you think you would be prejudiced against them?

A. I don't know.

The Court: You just say you don't know. I think he is entitled to an answer on that.

A. I don't know what the circumstances are in this case.

Mr. Looby: They have the policy, they say, of serving only white people, and of not serving Negroes, and they are supposed to serve only white people. Do you feel that—if they have the policy of serving only whites, that if Negroes went in there to be served, that that would constitute an offense and you would convict them?

A. I don't know. I can't answer that.

Mr. Looby: May it please your Honor, I think that with the attitude he has toward these things that he couldn't give a fair and impartial verdict in this case.

The Court: You told the counsel for the Defendants that you could give them a full, fair and impartial trial a while ago?

A. I think so.

By the Court:

Q. Can you stand by that, sir?

A. I think so.

By the Court:

Q. Well, do you know so?

A. No, I don't know so. I think I can, I can be fair.

[fol. 8] The Court: That's all that's required for you to be fair to the state and to the defendants. And if you are going to do that, sir, I think you are a competent juror. If you are not, then you are not competent.

A. Well, I think I could be fair. That's all I can say.

The Court: Gentlemen, that makes him competent.

Mr. Looby: Mr. Dickerson, do you understand the nature of this case?

A. Slightly.

Q. Well, then, I will try to explain it and if I don't, the Judge will stop me. The B & W operates a restaurant here, and they have a policy not to serve Negroes. Any white man can go in there and get served, no matter who he is, or what he looks like. But if he is a member of the Negro race, he is not allowed.

These boys are all Negroes, and they went there seeking service. And that is the only offense that is named—they are charged here with attempting to obstruct trade.

Now, with these facts, and readily realizing that you operated a bowling place here where you said you had a policy not to allow Negroes, and abiding by that policy, do you think you could give them a fair and impartial trial? Honestly?

A. I think so.

Q. You really do? Is that your honest conviction?

[fol. 9] A. I think I could.

Q. What do you understand a fair and impartial trial to mean?

A. Pardon?

Q. What do you understand a fair and impartial trial to mean?

A. What did he say?

The Court: (Repeats what Mr. Looby has just asked.) He said what do you understand a fair and impartial trial to mean?

A. Just the facts in the case.

Mr. Looby: And you think that if they had a policy not to serve Negroes, you think—you wouldn't think they were wrong, would you?

A. I couldn't say I do. I don't know.

Mr. Nichol: Your Honor, they are asking him to pass on the facts before they are heard. He is examining the witness—

Mr. Looby: I'm not examining the witness—

The Court: Yeah, Mr. Dickerson, did you understand him?

A. No, sir.

The Court: Repeat the question.

Mr. Looby: Do you really consider that this place, having a known policy to serve only white people, and not to serve Negroes,—that was their policy—and the fact that the Negroes went in there and demanded service—that they were wrong to do that?

Mr. Nichol: I make an objection to that, if your Honor [fol. 10] please.

The Court: Yes. I sustain your objection, General.

Mr. Nichol: That would be voir dire—to place the—

The Court: No, no, no, you made an objection. I sustain it. I think that will be part of his lawsuit.

Mr. Williams: Respectfully except, if your Honor please.

Mr. Looby: Do you think operating a business—do you think a group of Negroes coming in and demanding service—do you think that would affect your judgment here? That it would be obstructing trade?

Mr. Nichol: I object to that.

The Court: I sustain that, General. That calls for him to decide the lawsuit.

Mr. Looby: Mr. Dickerson, do you think or believe that in a public place since you are in Nashville, and in the United States of America, that citizens of the United States, regardless of their race, have a right to equal treament?

Mr. Nichol: If your Honor please, we object to that. It is a matter of law.

Mr. Looby: If your Honor please, it is not just a matter of law in this case. It is a matter of the law and the facts.

The Court: Well, I'll let him answer that, General, I believe.

A. I can't understand the gentleman. Will you repeat the last question?

[fol. 11] Mr. Looby: Will your Honor tell him what I said.

The Court: I think he asked you—I am not sure that I can state it exactly right—I think he asked you whether

or not you thought, under the law, Negroes and whites had equal rights in Nashville, and United States of America.

A. That depends.

Mr. Looby: On what does that depend, Mr. Dickerson?

Mr. Nichol: I just want to state an exception. You are asking the witness questions based on identical cases or maybe of slightly varying degrees. You are now asking him to pass on other cases. You said public places. That is not involved in this here. It's private.

Mr. Looby: I asked him no such question. You said that depends, Mr. Dickerson—it depends on what?

A. Depends on what the case dwindles down to. I am not sure. I haven't heard the case—and I'm not sure what it's all about. I've an idea.

Q. The question is whether or not in a place of public accommodation, whether any American citizen is entitled to equal rights regardless of race.

Mr. Nichol: Your Honor, he is asking him to pass on the law—not fact.

The Court: Gentlemen, I believe I will have to sustain the state's objection on that.

Mr. Looby: But I understood you to say that in operat-
[fol. 12] ing a bowling alley, in Nashville, for the public, you maintained a policy of excluding Negroes and that you didn't believe that they had an equal right to be served there? Is that what you said?

A. Yes.

Q. Did you say that? Now, I want you to talk so the Court can hear you. Don't shake your head. Say yes, or no.

A. (To reporter.) What did he say?

(Reporter repeats what Mr. Looby said.)

A. I can't understand him.

(Reporter repeats again.)

A. I can't understand him.

The Court: Well, repeat the question.

Mr. Looby: I understood you to say that in operating a bowling alley for public accommodation you maintained a policy to exclude Negroes and that is your policy?

A. Yes.

Q. It is?

A. That's right.

Q. And that is your policy, and that is still your feeling about it?

A. Yes.

Q. It is?

A. Yes, sir.

Q. And you think in spite of your feeling, Mr. Dickerson, about that situation, you think a question involving [fol. 13] the same principle,—you think you could pass on a fair and impartial verdict for the Defendants, these Negroes?

A. I don't know.

Q. As a matter of fact, you just couldn't?

A. I can't say yes or no right now.

Q. You have a doubt in your mind?

A. It depends on the circumstances.

Q. You have a doubt in your mind about it, don't you?

A. Why, yes, naturally. I don't understand the case.

Q. Yes, sir.

The Court: Are you saying, sir, that after you heard all the proof, after you heard all the charge of the Court, you still could not give these Defendants a fair and impartial trial because of your former policy? Your former technique? Your former opinion?

A. Well—

The Court: Is that what you are telling Counsel?

A. Well, it's the policy that I had.

The Court: And the feeling that you had?

A. (Hesitates.) I can't—I can't say.

The Court: You can't say now that you could give them a fair and impartial trial?

A. I think I can give them a fair and impartial—

The Court: Trial?

[fol. 14] A. Yes, sir.

The Court: That's all we ask you, sir, if you think you can give the Defendants, in spite of the questions that have been asked, and in spite of your former policy and business?

A. I think so.

By the Court:

Q. You still thing you can give the Defendants a fair and impartial trial?

A. I think I can.

The Court: Gentlemen, that makes—again, I repeat, that makes him competent, it appears to me.

Mr. Williams: May it please the Court, we respectfully except. This witness has unequivocably in response to a question as to whether or not in the light of his feeling he can give these Defendants a fair and impartial trial, he has said, "I don't know. I have doubts." Now, we respectfully except to the Court denying our challenge for cause, on the basis of the Court's then asking him over again, whether he can give them a fair and impartial trial. I think that what he means is that he can sit up there and listen. And that he just considers a fair and impartial trial in words. But it's going to be doubtful the substance of it. His answer was that he didn't know, that he had serious doubts, and we feel that, under those circumstances, that we are entitled to a challenge for cause, and we respectfully except, if your Honor please. We respectfully except to the action of the Court.

The Court: All right. I overrule your application for challenge for cause.

[fol. 15] Mr. Williams: May it please the Court, as I understand the statute, each Defendant is entitled to three pre-emptory challenges, is that right?

The Court: That's right.

Mr. Williams: Is that correct, sir, so—

The Court: That's the way I understand it.

Mr. Williams: That would be a total of 24 challenges?

The Court: Right.

Mr. Looby: We want the record to show, your Honor, that with most—with the utmost reluctance, we challenge pre-emptorily and we are now using, the record will show, one of our pre-emptory challenges in this instance when we are entitled to a challenge for cause, so if it becomes necessary to use all of our pre-emptory challenges, let it be considered an error.

The Court: All right. Let the—you do exercise pre-emptory challenge?

Mr. Looby: Yes, sir.

The Court: You will be excused, Mr. Dickerson. Now, Gentlemen, for the Defendants, in order to keep abreast of what we are doing, you ought to exercise it for some particular Defendant, and tell the Clerk.

Mr. Nichol: Which Defendant?

Mr. Williams: Lester G. McKinnie is charged.

The Court: All right.

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[fol. 27] (James L. Etheely is called to the witness stand as a prospective juror.)

(He is sworn and examined by the Clerk of the Criminal Court.)

The Court: Competent.

Mr. Nichol: You say you know none of the Defendants?

A. James L. Etherly.

[fol. 28] Q. We excuse him.

Mr. Williams: We would like for the record to show that this prospective juror was challenged and excused—the first Negro that has been called, and he was excused pre-emptorily by the State, without even an examination.

Mr. Nichol: Pre-emptory challenge.

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[fol. 199] (THOMAS BROWN is called as a prospective juror, sworn by the clerk and examined by the clerk.)

[fol. 200] The Court: You have not formed or expressed an opinion?

A. No.

Mr. Nichol: I believe you say you work for what company?

A. Greyhound Bus Company at 6th and Commerce.

Q. What is your job?

A. Ticket agent.

Q. What are your duties? Do you sell tickets?

A. Yes, sir.

Q. In other words, when people come to the window, you sell the ticket?

A. Yes, sir.

Q. Take the money?

A. Yes, sir.

Q. And they get on the bus?

A. That's right.

Q. And of course you come in contact with hundreds of people?

A. Yes, sir.

Q. Every day?

A. That is true.

Q. Both white and colored?

A. White and colored.

Q. You treat them alike? You do that?

A. Yes, sir, we do.

Q. And I believe the Greyhound Bus is a public service?

[fol. 201] A. Yes, sir.

Q. Using the highways?

A. Yes, sir.

Q. Interstate?

A. Yes, sir.

Q. Now, you know none of these defendants? Do you?

A. No, sir. I may have waited on them if they have ever rode the bus, but to actually know them, I don't think so.

Q. You don't try to remember the faces of all that come up to that window?

A. I am afraid, sir, I couldn't do that.

Q. Now, in this case, the indictment charges that these defendants went to the B & W Cafeteria which is a privately owned concern. Not a public service. Not a public owned concern, in any way. And it is charged here that they conspired to obstruct the business of that—trade and commerce of that concern. Have you any opinion either way of the facts in the case?

A. Not until I could hear them, I don't think so.

Q. In other words, you say you could go into the jury box, and listen attentively to the evidence of the witnesses, and then listen to the charge of the Court, and then render a fair and impartial verdict on that and that alone?

A. Sir, I really don't know. As you know, we work—I [fol. 202] don't know—this doesn't have any bearing on this case, but I have worked at the bus company for 21 years. And we have had sit-ins in our station, as at the restaurant. Not for the ticket counter, or anything like that, but at the restaurant. However, none have occurred while I was on duty.

Q. But you know nothing about the facts of this case?

A. No, sir.

Q. Could you go in that jury box and decide this case solely on the evidence in this case, and the charge of the Court—not what somebody may have told you about other cases?

A. I don't know.

Mr. Williams: We request that this witness be excused.

The Court: Wait a minute. He has not finished with him, (to Mr. Nichol) have you?

The Court: Have you?

Mr. Nichol: You know nothing about the facts of the case, do you?

A. No, sir.

Q. Is there any reason why you can't go into the jury box and decide this on the law and evidence alone? Will you do that, if you go into the jury box?

A. I will try to be as fair as I know how to, to the best of my ability.

The Court: Do you accept him?

A. Yes, sir.

[fol. 203] The Court: Do you know—you don't know of any—or do you know of any reason why you couldn't take a seat and give both sides a fair and impartial verdict?

A. No, sir, not after hearing the facts.

The Court: And render such verdict as you think truth and justice dictate?

A. (Nods.)

The Court: All right.

Mr. Looby's examination:

Q. Mr. Brown?
A. Yes, sir.
Q. You work for Greyhound Company?
A. Yes, sir, at the ticket office. On Commerce.
Q. And you have had some sit-ins at the lunch counter?
A. Yes, we have.
Q. And because of those sit-ins, you have formed some opinions as to the legality of the sit-ins, haven't you?
A. Sir?
Q. You have formed an opinion because of what you have experienced with them?
A. Not of this case, no, sir.
Q. I didn't ask about this case. Having had some experience with these sit-in demonstrations, you have formed an opinion as to the legality of it? Haven't you?
[fol. 204] A. Sir?
Q. Having had some experience with these sit-ins, you have formed an opinion as to the legality of them, haven't you?
A. Sir, I wasn't present on duty at any time they have occurred.
Q. Didn't I understand you to say you had some experience down there with these sit-ins?
A. Yes, sir, they have had. They did have.
Q. You know they had sit-ins?
A. Yes, sir, yes, sir.

Q. And that affected your opinion about these sit-ins, didn't it?

A. (Hesitates.)

Q. You have formed some opinions about these sit-ins, haven't you?

A. Might possibly, yes, sir.

Mr. Nichol: We except to the question, if the Court please, about his not asking about this particular case. If a man sees a murder last month—

The Court: Sustained. I have ruled on that.

Mr. Nichol: Yes, sir.

The Court: You may ask him about the sit-in at the B & W.

Mr. Looby: Based upon your experience and the opinion that you have formed of the sit-in demonstrations, if you were to be selected to the jury to try a case where a sit-in [fol. 205] was involved, that would affect your opinion, wouldn't it?

A. I would try not to lean either way.

Q. But it would, nevertheless? Wouldn't it?

A. I can't hardly answer that.

Q. You can't answer that? But you know based upon your answer depends whether or not you are selected, don't you?

A. (Hesitates.)

Q. Can you go into this jury box, Mr. Brown, and try this case, just as if you had never heard of or never seen a sit-in before?

A. If I go in, I would try to take the facts of this case, yes, sir.

Q. Wouldn't your former experience influence your opinion?

A. (Hesitates.)

Mr. Nichol: Well, your Honor, experience might affect—influence everything from a kid right at home.

The Court: I think the question is this, Mr. Juror. Even if you have any preconceived opinions—already formed opinions, about the sit-ins, even if you have such, could you take a seat in that jury box, if you were selected as a juror here, lay aside those preconceived ideas, if any such you do have, and listen to the proof, and listen to the charge,

and give both the state and the defendants a fair and impartial trial?

[fol. 206] A. I would do my best.

By the Court:

Q. That's all anybody can do.

Mr. Looby: Mr. Brown, I want to go a little farther than that. If you were selected as a juror, to try a case in which a sit-in demonstration was involved, does the fact of your previous knowledge of sit-ins involve or influence your decision in arriving at it?

A. In arriving at the verdict?
Q. Yes.
A. I would try to be impartial.
Q. I don't care what you'd try and what you wouldn't.
A. To the best of my ability, sir.
Q. Now, you are telling this court now, that regardless of the opinion which you have formed, based upon the experience of where you work and the sit-in demonstrations there,—

Mr. Nichol: May it please your Honor, we object to that. He said he wasn't there. He said he wasn't there.

Mr. Looby: I think the Attorney General should let me finish my question and let the Court tell him.

The Court: Well, let him finish the question.

Mr. Looby: I am trying to insist that this court is controlled by the Court and not by the Attorney General, your Honor please.

The Court: I do that, sir.

Mr. Looby: Deep down in your conscience, do you feel that if you were selected to try a case where a sit-in demon-
[fol. 207] stration was involved, and you could arrive at a decision separate and apart from the incident down at the Greyhound Bus Lines?

A. As I say, I would try as ho tly as I could.
Q. It might have some effect, e n though you tried?
A. It might possibly.
Q. Your Honor, I want to excuse this witness—to challenge this prospective juror for cause.

The Court: I overrule you on that. I think this juror has said that he would do the best he could to give you a fair trial.

Mr. Looby: But even though he said he would try to give a fair trial, and he makes the effort, it would be superimposed upon the background of his experience with sit-in demonstrations,—I don't think, your Honor, that he is a competent juror to try this case.

The Court: I am sorry I can't agree with you on this—that this particular juror is contaminated.

Mr. Looby: Mr. Brown, were you employed by Greyhound Bus Lines about the time that about 60 students were arrested because of a sit-in demonstration down there?

A. I was employed at the time, yes. Uh-huh.

Q. And you were fully cognizant it was down there?

A. Sir?

Q. And you were fully cognizant it was there?

A. I wasn't there at the time.

Q. But you knew about it?

[fol. 208] A. Oh, yes, I knew about it.

Q. And you were employed at the bus terminal? How many times have a large group of students been arrested for sit-in demonstrations by your company?

A. How many?

Q. How many times have a large group of students been arrested for a sit-in demonstration by your company?

A. I am sorry, sir, I can't answer that.

Q. But it was done?

A. I think so, yes.

Q. You are still working for the company?

A. Yes.

Q. And you have the interest of the company at heart?

A. Sir?

Q. You still have the interest of the company at heart, don't you?

A. I try to do the best for them that I can, yes, sir.

Q. And yet you still say that you want to be selected as a juror to try these students or some students on a similar circumstance and a similar charge?

A. As I said,—

Q. Do you want to sit on the jury, Mr. Brown?

A. As I said before, I would give it as fair a trial or opin-
[fol. 209] ion, or do the best that I can.

Q. Your Honor, please, in the face of this evidence given by this prospective juror, we think that we are entitled to have a challenge for cause, and we so challenge him, if your Honor please.

The Court: I think I will have to overrule that, gentlemen.

Mr. Looby: We respectfully except, if your Honor please, and we reluctantly use one of our pre-emptory challenges, for John R. Lewis.

The Court: You are excused.

Mr. Williams: If your Honor please, we would like to call the Court's attention to the fact that the state is permitted to challenge a Negro venireman simply on the statement that he was an employee of the prosecutor, and we are having to use a pre-emptory challenge. We feel that this was an analogous situation, and we should not have been required to use this in this case.

Mr. Robinson: Your Honor, it went further than that. He said he knew about the facts in this case, and that he has been present when this happened as well as other instances, at the B & W Restaurant.

Mr. Williams: He didn't say he was present when this happened.

Mr. Robinson: He certainly did.

Mr. Looby: The record will show exactly what he said.

The Court: Yeah. All right.

* * * * * * *

[fol. 384] The Court: All right, gentlemen. Bring in another prospective juror.

(#59, Rosa Lee Copeland is presented as a prospective juror and sworn and examined by the Clerk.)

The Court: He asked you if you had formed or expressed with reference to the guilt or innocence of either one of
[fol. 385] those 8 defendants?

A. Yes, I will.

Q. You have formed or expressed an opinion?

A. No. I didn't understand it. I can't hear too well.

The Court: I say—you can't hear too well?

A. I can't hear too well. I didn't know what he said.

The Court: Well, he asked you if you had formed or expressed any opinion as to their guilt or innocence.

A. Oh, no.

Q. Can you hear all right?

A. Yes.

The Court: Competent.

Examination.

By Mr. Nichol:

Q. What is your address?

A. 1016 16th Avenue, North.

Q. That is between—near Hart or Jefferson?

A. Between Meharry and Phillip.

Q. Between Meharry and Phillip? I believe, then, you live about 2 blocks from Fisk University. Is that correct?

A. That's correct.

[fol. 386] Q. Did you attend Fisk University?

A. I went to Williamson County School in Nolensville, Tennessee.

Q. What is your—are you working anywhere? What is your occupation?

A. I am the dispatcher for McCall Cab Company.

Q. McCall Cab Company? I notice some of these defendants live on 18th Avenue, North. Do you know where any of them live?

A. I don't know any of them, much less where they live.

Mr. Williams: No defendants live on 18th Avenue North, if the Court please. Some live on 28th.

Mr. Nichol: 28th? Do you know any of these defendants over here? Which one do you know?

A. I don't know any of 'em.

Q. You don't know them by sight?

A. No, I don't know any of 'em by sight, or name either.

Q. Have you, at any time, ever attended any meetings at the church on 8th Avenue, North? to see—

Mr. Looby: I object to that, if the Court please. If this prospective juror wants to attend meetings they have in

church, what has that got to do with it? That don't mean [fol. 387] much. They have all kinds of meetings. If its some special kind of meeting, now I won't object to that. It could be prayer meeting, or church services,—she has a right to go to church.

The Court: Ask her about the meeting, then.

Mr. Nichol: Have you ever attended any meetings—have you ever been to the church to hear Rev. Kelly Smith?

A. No, I haven't.

Q. Have you ever attended any meetings about sit-ins?

A. No, I haven't.

Q. Where sit-ins were discussed?

A. No, I haven't.

Q. Do you belong to the NAACP?

A. No, I haven't.

Mr. Williams: We object to that, if your Honor please.

Mr. Looby: I object to that. I belong to the NAACP, and I am proud of it. It doesn't matter if she belongs.

The Court: I find no fault with him asking that.

Mr. Nichol: Has anybody discussed these cases with you?

A. No, sir.

[fol. 388] Q. Have you read about them in the newspaper?

A. No, I haven't.

Q. Would it embarrass you to sit on this case when you live right there near Fisk University?

A. Would it embarrass me?

Q. Yes?

A. No.

Q. Have you discussed this case with friends?

A. No, I haven't.

Q. You want to sit on the case?

Mr. Williams: Well, I object to that, if the Court please.

The Court: I sustain it.

Q. Would you like to sit on the case?

A. We object to that, if your Honor please.

Mr. Nichol: We'll excuse you. We'll excuse you. You may go now.

Mr. Williams: May it please the Court, let the record show that this witness was a Negro.

Mr. Nichol: Also Earl Price. I don't think you put that in the record.

(#45, FLOYD G. DAVIS is called as a prospective juror, is [fol. 389] sworn and examined by the Clerk.)

The Court: He is competent.

Examination.

By Mr. Robinson:

Q. Mr. Floyd G. Davis?

A. Yes, sir.

Q. Answer so the Court Reporter can hear you. Talk out. Where do you live?

A. 823 12th Ave., S.

Q. Do you have a family?

A. Wife.

Q. Do you have any children?

A. No.

Q. How long have you been a resident of Davidson County, Tennessee?

A. About all my life.

Q. You born here?

A. Yes.

Q. What is your occupation?

A. Painter.

Q. Who do you work for?

A. Fisk University.

Q. Beg pardon.

A. Fisk University.

Q. Fisk University? Now, there are certain students here who go to Fisk University, who are defendants. Do [fol. 390] you feel like you could give them a fair trial, as well as the state because you work for Fisk University and they go to school there at Fisk University?

A. I think so.

Q. Do you know any of these students by sight?

A. No.

Q. Or name?
A. No.
Q. You know none of them?
A. No.
Q. How long have you been at—employed at Fisk?
A. About—a little better than a year.
Q. A little better than a year?
A. Yes.
Q. Did you— Where did you go to school?
A. I went to school here.
Q. Where?
A. I went to school here at Pearl High.
Q. Pearl High School? Are you familiar with the facts involved in the—wherein these students went to the B & W Restaurant on 6th Avenue? Are you familiar with that?
[fol. 391] A. No. Well, I have heard of it.
Q. Heard of it? Who did you hear about that from?
A. By reading.
Q. You didn't hear it from some of the other students out at school?
A. No, just by reading the newspaper.
Q. Oh, I see. Well, other than the newspaper, have you heard about it from anybody?
A. No.
Q. Are you familiar with the facts involved?
A. Not at all.
Q. You have no special knowledge of the facts involved?
A. Not at all.
Q. Not at all? Any of your kin folks go to Fisk University?
A. No.
Q. Are you a member of any group or association that advocates either integration or segregation?
A. No.
Q. Have you ever attended any meetings of that sort where that was discussed?
[fol. 392] A. Well, I guess I have.
Q. Where did you attend those meetings?
A. At Fisk University.
Q. At Fisk University. Were—are you familiar with a committee called the Non-Violence Committee?
A. No, I do not.

Q. Were any of these defendants that are present today, at those meetings? That you went to?

A. Not that I know of.

Q. Not that you know of? Are you a member of the Christian Leadership Council?

A. No.

Q. Are you familiar with that organization?

A. Yes. I am.

Q. Is that a Fisk organization?

A. I don't know.

Q. Huh?

A. I told you I don't know.

Q. You don't know? Have you ever witnessed a non-violence demonstration?

A. No. Never have.

Q. Never have in your life?

A. No.

Q. Do you know what they are?

[fol. 393] A. I have read about them.

Q. That is all you know about them? You have read about them?

A. Yes.

Q. Where were you employed before going to work at Fisk University?

A. Sir?

Q. Where did you work before?

A. I was self-employed.

Q. Doing what?

A. Painting.

Q. Painter? What sort of paint job do you do—homes, or interior decorating?

A. Well, any kind.

Q. Any kind,—of a painting job? Have you ever been convicted of a felony?

Mr. Williams: We object to that, if the Court please.

The Court: Wouldn't you—

Mr. Williams: He can ask him if he knows of any reason why he could not qualify and serve as a juror.

Mr. Robinson: Oh, no. I can ask him if he has been convicted. That would be a proper question to see if he is

fit to sit on this jury. I can ask him if he has ever been convicted of a felony. That goes for anybody that takes [fol. 394] that chair, that's a prospective juror.

The Court: I rather think that is a competent question.

Mr. Robinson: Have you ever been convicted?

A. No, I haven't.

Q. Never been convicted of a felony?

A. No.

Q. Did you ever work for A & I University?

A. No, I haven't.

Q. Does your wife work?

A. Yes.

Q. Where?

A. Peabody Demonstration School.

Q. Peabody Demonstration School? Have you ever been represented by Mr. Looby? Or Mr. Williams.

A. I know Mr. Looby.

Q. You know them, don't you? Now, what's the connection?

A. I see him.

Q. Where did you get acquainted with Mr. Looby? Just see him on the street? Have you ever talked to him? Did you speak to him today?

A. No. I haven't—not today.

Q. Have you ever been contacted about this matter since [fol. 395] you have been under subpoena? Under subpoena to be here today?

A. No, sir.

Q. Have you told anybody about it other than your wife and family?

A. No.

Q. That's all. We will excuse him.

Mr. Williams: Let the record show that this, likewise, is a Negro.

Mr. Robinson: Let the record also show that he works at Fisk University.

Mr. Looby: Let the record show the effort on the part of the state to exclude all Negro peers of these defendants.

The Court: Gentlemen, it doesn't make any difference; so long as the state and the defendants have challenges

they may exercise them. They don't have to give any reason one way or another.

Mr. Looby: No, sir, but we want this record to show this effort on the part of the state to exclude all Negro peers of the defendants. We want the record to show that definitely.

The Court: You may, if you want to, state for the record that that was a Negro. I have no objection.

Mr. Looby: I only ask, your Honor, that the record show [fol. 396] that it was a Negro.

The Court: All right. There's no use for us to waste our time explaining why they are excused. If they are preemptorily challenged, that ends it.

Mr. Looby: I only want the record to show they were Negroes.

The Court: All right.

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[fol. 446] (#73, HERBERT AMIC, called as a prospective juror, is sworn by the clerk and examined.)

The Court: Have you formed or expressed an opinion as to their guilt or innocence?

A. Not on this particular case.

The Court: In this particular case where the defendants are charged with obstructing trade and commerce at the B & W Cafeteria?

[fol. 447] A. I have not.

The Court: All right.

Examination.

By Mr. Robinson:

Q. Mr. Amic, have you ever been on a jury before?

A. No.

Q. Never tried a criminal case in your life?

A. No, I was called in, but didn't serve, on the jury. I have been called.

Q. I see. What is your business?

A. Finance. Finance company.

Q. Finance company? Are you related to Glenn Amic?

A. No.

Q. What finance company are you with?

A. Phelan—421 Union Street.

Q. Do you discriminate in your business between the races?

A. Well, not to any great extent.

Q. Can I borrow money? Can I borrow money at your place?

A. Any person can borrow money at my place.

Q. Any one of these—

[fol. 448] The Court: I don't think it is fair to ask him if you can borrow money, now. (laughs)

Mr. Robinson: Well, if your Honor please, I might need some, or any one of these defendants, including Mr. Looby.

The Court: Well, I know, but don't ask him that on the witness stand. It is embarrassing.

Mr. Robinson: All right. Irrespective of the color, they can get money if they qualify?

A. With the same qualifications, anybody can borrow money from me.

Mr. Looby: You can see me if you want any.

Mr. Robinson: What's that?

Mr. Looby: I said you can see me if you want some.

Mr. Robinson: O.K. I appreciate that. I might need some.

(To prospective juror) Where did you live before you moved to Oak Street?

A. I have been on Oak Street for about 9 years. Prior to that time, I lived on Riverwood Drive.

Q. Now, Oak Street, I believe, is in Madison?

A. No. It's in Inglewood.

Q. Inglewood?

A. Yes. There is an Oak St. in Madison.

[fol. 449] Q. I see. This happens to be the Oak Street in Inglewood?

A. Right.

Q. Where did you live before you moved to Nashville?

A. I was born and raised here.

Q. Born and raised here?
A. That's right.
Q. Do you have children in school out there?
A. Yes, sir.
Q. Where do they go to school?
A. Jere Baxter.
Q. Jere Baxter? I believe that's an integrated school, isn't it?
A. Yes.
Q. Do you have any special knowledge about the law on criminal conspiracy in interfering with trade and commerce of a business house?
A. Not to any extent.
Q. Would you depend on the Court to tell you the law? And the Court alone to tell the law in this state?
A. Yes.
Q. You don't have any preconceived ideas about what [fol. 450] the law is, do you? In this matter?
A. Well, I've got my own opinion.
Q. You have got certain opinions?
A. That's right.
Q. But legally speaking, you don't know what the law is in Tennessee on a conspiracy that interfered with trade and commerce?
A. No, not specifically.
Q. Then you would depend on the Court for that?
A. Right.
Q. You would depend on the Court for that?
A. Yes, I would do that.
Q. Now, if you are selected to sit as a juror, in the jury box, would you take into consideration anything other than what you hear on the witness stand?
A. That would be hard to say. I mean I have my own opinion of the thing in general. It's the way I feel already about it.
Q. How do you feel?
A. Well, I don't like anything that forces a person to run his business other than the way he wants to run it.
Q. Well, now, can you conscientiously—now, to be per- [fol. 451] fectly honest with me—could you lay aside that

opinion, and listen to the evidence from the witness stand?

A. Yes.

Q. And the law according to the Judge's charge? And the evidence? And then be fair both to the state and these defendants?

A. Yes.

Q. Irrespective of whatever your opinion is at the present time?

A. Right.

Mr. Nichol: We accept him.

Examination.

By Mr. Williams:

Q. Mr. Amic, you have the opinion that any person should be allowed to run any business any way he wants to?

A. Right.

Q. And you have that opinion, notwithstanding the fact that we regulate public utilities every day?

A. Pardon?

Q. You have that opinion, notwithstanding the fact that we regulate public utilities every day—what they can charge people, do we not?

A. I hadn't thought about that.

Q. And we regulate the business you are in, don't we—don't we have a small loan statute?

[fol. 452] A. I am sure there is.

Q. That covers you in your business?

A. I am sure that they would have, yes.

Q. That covers you on your job. But what you mean is that you should be allowed to discriminate against Negroes if you want to? In a business? That's what you mean, isn't it?

A. Yes.

Q. Yes? So that your opinion is not limited to business in general, but it is related to—specifically to the segregation of Negroes?

A. I think it is up to the individual. I, myself, don't say that I wouldn't allow them to come into my place.

Q. But you think that a business open to the public should be allowed to exclude Negroes?

A. If they so desire, yes.

Q. A restaurant business, then specifically,—in particular? And having that opinion wherein the indictment in this case charges that the B & W Cafeteria had had such a rule, and that these defendants went there and sought service, knowing that the B & W had such a rule, and then you would start out with a prejudiced attitude toward these defendants?

A. Well, I would—

Q. By reason of your belief?

A. —I would believe the B & W would be right in this [fol. 453] case in their position.

Q. And you would start—what I am saying, though, is you would start out in this case with a prejudiced attitude toward the defendants, wouldn't you?

A. In this particular case, I imagine I would.

Q. Yes, sir. And, it would take evidence on the part of the defendants to prove that they had a right to be there to overcome that prejudice?

Mr. Amic: (starts to answer)

Mr. Nichol: If your Honor please, I want to renew my objection here. Let the juryman step out.

The Court: All right.

Mr. Looby: If your Honor please, is it time for a recess?

The Court: Well, let's settle this matter first,—(the prospective juror steps out.) —before we do.

Mr. Nichol: May it please the Court, we have set forth in this presentment in plain words that it is the theory of the state and our belief as to the law, not as to public service things but private business,—we say the law is that any owner of a private concern has a right to select his customers on any ground that he sees proper, which includes the right to exclude a person by reason of color.

Now, the Court has permitted these attorneys witness [fol. 454] after witness to challenge the jury on the ground that they believe and that the state contends, too that the law is proper.

In other words, every veniremen that has come up here yet, that said that the owner has the right to exclude a person from his private business, his private premises, that is sufficient to disqualify the juryman.

Now, we say this. We want law-abiding citizens on this jury. And people that believe in the law and advocates the law, and not people who—to limit the state to people who go utterly against the grain of the law, and who put the desire and greed to other designs of those rights, and qualify the jurymen on that.

Now, if a juryman comes up here and says that regardless of the law in this case, that they go in defiance of the owner, they are competent jurors. Now, if your Honor please, we—the question first is as to the guilt or innocence of these defendants on the facts.

We have got a belief here of every kind—a belief of some kind or another. We say that is not competent, for a veniremen to be examined on that on every subject. And I say, when one of them comes up here and expresses a belief of the law— Now, as I understand it to be, now I don't know what the Court is going to charge, then that—because he believes in the law as it actually is, he is a prejudiced man.

[fol. 455] The Court: No.

Mr. Nichol: On that subject.

The Court: I don't think so. I have tried to keep away from that, General, and I hope that we have. That is, I have tried to ask him, in spite of what he thinks,—we are not concerned about what he thinks. If he will just be fair and sit there and listen to the evidence and the charge of the Court, that is all I think it takes to qualify him to be a juror. What if he has got some ideas of his own, they may be right, and they may be wrong!

Mr. Nichol: But the thing was—the disqualification to me is not some opinion on some collateral matter, but as to the guilt or innocence of these parties here. And they—if they've got the view all set up, that doesn't make them—

The Court: And if the prospective juror will stay away from saying he's prejudiced against it—against them, I think you are exactly right. I agree with you. If I could keep these jurors' mind on whether or not they—their mind is open. That's all.

Mr. Nichol: On the facts of the case.

The Court: On the facts and the law.

Mr. Nichol: And not the rule—we are trying on the rule of the cafeteria, and not on the facts of the case, instead of the facts of the case.

The Court: They could be right and they could be wrong, about their opinion, and I am not interested in that.

[fol. 456] Mr. Looby: If your Honor please, all of this misunderstanding and all of this noise is caused by one source. It all came from this one source. This illiterate, unwise and unnecessary and prolific and dangerous—all these statements here, that they have called in the indictment—these are the ones that are giving us trouble here. That is the cause of the trouble. As a matter of fact, if we had an indictment such as is generally drawn up, we would have been through with this long ago, but what we have here is the District Attorney's triumph, and he said he wrote it. It's not very—I don't think it is anything to claim credit for. But he says he wrote it, and since he wrote it, with all this hodge-podge, that's what it is, but if they did charge a conspiracy then that would revolve around that, but all of this has gotten around to the jury, and we have a right to charge the jury as to what he is going to hear in this hodge-podge.

Now, if they didn't want us to go into it, then they ought not to have brought it up. But they brought it out and it is certainly pertinent for us to go into it, in selecting the jury.

Now, if a juryman volunteers a statement, volunteers that he is of the opinion that a man ought to run his business as he pleases, and since it is centered around that, and since it is a policy of the restaurant on which this is predicated, we have a right to go into that. Now, are you going to carry that into the jury box with you? And then [fol. 457] how far are you going to carry that? And if predicated upon what is said here, and while you are sitting in, based on your opinion you have now, will you take it into the jury box with you—we want to have a right to know,—what—if they would be competent. Or even if they are accidentally volunteered,—usually it is brought up by the state,—do you have an opinion, and of course that's what the state wants to hear—that's what

they're looking for—people with definite opinions as to the manner they are operating this restaurant.

So I agree with the Court in this respect. This Court is not here to enforce the policy of the B & W or the XYZ or any other monstrosity. That is not the policy of the state. The only policy of this state and this court is to determine whether a criminal offense has been committed, and the enforcement of the matters of this policy is not a criminal offense.

I think I said before here in the other court trial—in the federal court— We had a steward and a waiter and a chef being prosecuted for embezzling—the railroad. They had a scheme in there—one take the order, and one made out the bill, and between them the railroad got little. They would deduct here and deduct there and between them the railroad got little of the money. And the government attempted to show the rules of the railroad, how it ought to be operated, and the government got up and said, wait a minute, we are not here to enforce the laws of the railroad, we are here to enforce the laws of the government. [fol. 458] And that's how that same thing applies here. The Court is not here to enforce the policy of the B & W Cafeteria,—it is only whether it is a conspiracy. But when all these facts are brought in, and when the policy of the B & W Cafeteria is outlined, in detail, in this indictment, certainly then we have to go into it. Because this indictment is part of the record, and not only part of the record, but will be presented to the jury and they have this and consider it and what is in here, and certainly we ought to question them on the *voir dire* as to what is in here, and especially when the *voir dire* provisions—as to how a man should operate his business.

The Court: Only as to the question, sir, as to whether or not they are prejudiced against people as such. That's what I tried to say, and that's the test, gentlemen. And that is the only test that's really applicable. And that is the only thing for which it can serve. Only as prejudice is there. It doesn't make any difference about what their idea was, as I indicated.

Well, let's call that witness now—that prospective juror back.

Mr. Looby: Are we going to take a recess, may it please your Honor?

The Court: Yes, we'll take a recess now. Bring that prospective juror in here now that I have had in my office.

(A recess was then had from 2:45 to 3:12 P.M.)

[fol. 459] The Court: Let's continue, gentlemen.

Mr. Williams: In view of this last response, if your Honor please, of the witness, we ask that he be excused for cause. He has stated that he would start out with prejudice and that it would require proof on their part to—

Juror: May I clear it up?

The Court: Let me ask this witness a question: Do you have any prejudice against Negroes as such?

A. That's what I wanted to clear up. Now, no prejudice against Negroes at all.

The Court: All right.

A. It would be the same situation if the B & W said that they wouldn't serve people after 6 o'clock without a dinner coat, or something. I think they would have that right to refuse to serve.

The Court: Well, I am not interested in what you think about that. That's got nothing to do with this matter now—You might be thinking all wrong, or you might be thinking all right. What I am interested in is whether or not you have got a fair and open mind.

A. I have no prejudice against them. I have dealt with them all my life practically. I have some very close friends who are colored. There is no prejudice so far as that is concerned.

The Court: Irrespective of any preconceived ideas you [fol. 460] might have, about rights of people to serve or not to serve, could you still step in that jury box over there, if you are selected, lay aside any ideas you have of your own, listen to the evidence from this witness stand, the charge of the Court, and after the case is concluded, on your oath as a juror, render a verdict that you think is fair and impartial to the state and to 8 defendants?

A. I certainly could.

Q. You sure could. That sure makes you a competent juror.

Mr. Williams: Well, now, Mr. Amic, haven't you stated that by reason of your opinion, regarding the right of the B & W Cafeteria to exclude Negroes, if it wanted to—

The Juror: Well, now—

Q. Wait just a minute—please, sir. That if evidence was shown in this case—that if the indictment charges that the defendants went there, knowing of this rule and the defendants, being Negroes, sought service, that it would prejudice you against them?

A. Well, it would have to be shown to me that it was—that they did violate some regulation like that.

Q. Yes,—

A. To begin with.

Q. But, if they had a rule that they excluded Negroes, and these defendants went there and violated that rule, it [fol. 461] would prejudice you against these defendants, wouldn't it

A. If—if it was a proven fact that that was their rule, and that they were there against the cafeteria's rule, why I think they have a right to enfore that rule.

Q. And you would start out with that prejudice against the defendants, wouldn't you?

A. Not necessarily, not until it is proven exactly they did violate the rule and violate some law.

Q. We are not talking about law now. We are talking about the rule of the B & W Cafeteria.

Mr. Robinson: If your Honor please, we are not trying any rules of the B & W Restaurant.

The Court: No, that's exactly right, and we are only talking about the law.

Mr. Nichol: An averment or indictment is not proof. They are trying to get a juryman before he is sworn, befor he hears any proof, to try to find out what the reaction of the jury would be to subsequent proof. The basis right now, if he is accepted on that jury, is if he is prejudiced or biased. You cannot take, or state, parts of proof, and

regardless, as I have said, an averment is not proof at all. To see how a jury is going to react to the proof later on,—the elements of proof later on. It is not competent at all.

Mr. Looby: May it please your Honor, from the basis of your Honor's statement, I want to move that it be stricken,—from the face of this indictment be stricken all [fol. 462] statements with reference to the policy of the B & W Cafeteria, about who they are to serve to. The only thing germane to the indictment is whether—for the purposes your Honor ruled—if we cannot examine the prospective juror on that particular phase, I don't think it should remain in the indictment until it should be read. I move it should be stricken.

The Court: I overrule your motion on that. Gentlemen, I don't know what allegations they have in there that may or may not be proved, and that is a thing we will have to determine when we reach it, in the proof of this case. All I am interested in is a man that is fair-minded when he starts.

Mr. Looby: I want to respectfully except to your Honor's ruling,—

The Court: All right.

Mr. Looby: —on my motion to strike.

The Court: All right.

Mr. Williams: Now, may it please your Honor, I would like—the District Attorney has been jumping up during the course of my examination. Now, I would like to say, with regard to this, if the Court please, that there is no way in the world for the defendants to know what we are confronted with in a case other than what is charged in the indictment. And there is no way in the world that they can qualify a juror to try it other than on that charge, in the indictment.

The Court: I understand, gentlemen, and the answers [fol. 463] of the juror, the prospective juror, to the question qualified him. That's all. He says he is a fair-minded man, that he has no prejudices, and that he will give the state and the defendant a fair and impartial trial. Regardless of what the proof is, he will listen to it. Didn't I understand you to say that, sir?

A. Absolutely.

Mr. Williams: May it please the Court, I respectfully submit that I cannot be limited on my *voir dire* examination of what a witness thinks that he is a fair-minded man. I think—the most vicious criminal—

The Court: Ask him then what—

Mr. Williams: —in the world can say that.

The Court: Well—

Mr. Williams: I want to be able to inquire about some of these witnesses's attitudes so that I can find out if I think he is a fair-minded man, your Honor.

The Court: Gentlemen, I am not going to let you inquire into special parts of this presentment, or in asking him questions in hypothetical cases. Now, you may ask about how he feels about the matter, with reference to whether or not he's got bias or prejudice. And that's the question.

Mr. Williams: We respectfully submit, may it please the Court, that he has already indicated that, but we would [fol. 464] like to question him further.

Or you, or have you ever been a member of any organization which advocates segregation of the races?

A. No.

Q. Have you ever attended any meetings of any such organization?

A. No.

Q. What church are you a member of?

A. Church of Christ.

Q. Your church advocates segregation? Doesn't it?

A. I suppose it does. I never thought of it along this line.

Q. Your church is a lily-white church, isn't it?

Mr. Maddin: What is a lily-white church?

Mr. Williams: Well, exclusively white, isn't it? The church you attend is attended exclusively by white people, isn't it?

A. That's the first time I'd ever thought about never seeing colored people in that church.

Q. Well, you haven't gone out and looked for any Negro churches to attend, have you?

A. In my particular area, I don't believe there is any.

Q. You live in an exclusively white

[fol. 465] don't you?

A. That's right.

Q. You didn't go look for a Negro area to live in?

A. No.

Q. You said you had some Negro friends—do you have any Negro friends who visit you in your home and have dinner with you?

A. No.

Q. Do you have any Negro friends with whom you have dinner, or go out socially occasionally?

A. I have never been invited.

Q. And you have never invited any either, have you?

A. No.

Q. So, as a matter of fact you don't have any Negro friends on a basis of social equalization or on a basis of equality, do you?

A. No, I have during the time in the service. I have eaten with them, slept next to them, etc. Partied with them.

Q. And how long were you in the service?

A. 2 years.

[fol. 466] Q. And the service—was that the Korean War?

A. Yes.

Q. In the service you were thrown with Negroes as a result of military compulsion, were you not?

A. Yes.

Q. Yes? And any equality, that you had, existed because—as a result of the equality of military rank?

A. Yes.

Q. I will ask you if you grew up in exclusively white schools, didn't you? Went to white schools?

A. Yes.

Q. Exclusively white schools?

A. They were the only ones to go to at that time.

Q. Sir?

A. I believe they were the only ones available at that time.

Q. Well, there were some Negro schools? Weren't they? In Davidson County?

A. Yes.

Q. As a matter of fact, your whole contact, your whole association with Negroes, has been to loan them money on small loans? And such services?

A. No. I have played basketball with them, I played with them when I was younger.

[fol. 467] Q. This was in the Army?

A. No. That was back in my high school days, and even before that.

Q. You mean you played basketball? Your school played basketball with—

A. No, we played in our backyards together.

Q. Backyards?

A. Yes.

Q. But you feel like the exclusion of Negroes from a restaurant is just the same as closing the doors at 6 o'clock. If a man operates a restaurant for the public, he would be allowed to exclude Negroes—to exclude me, just because I happen to be a shade darker than you are. I don't know whether I am or not. Maybe I am. Just because I have some African in my background, then I am not admitted. Do you feel like that?

Mr. Maddin: I object to that. That hasn't got anything to do with the case.

The Court: Sustain the objection. What was his answer?

A. I didn't follow—

Mr. Williams: Well let me ask you. Do you feel like a restaurant's exclusion of a human being arbitrarily because his grandfather may have been African is the same thing as closing his store at 6 o'clock to all people in the [fol. 468] community? Do you feel like that is morally and legally correct?

Mr. Nichol: That is immaterial, if the Court please.

The Court: Sustained, gentlemen.

A. Uh—

The Court: You don't have to answer. Sustained.

Mr. Williams: Have you ever—Mr. Amic, I don't want you to feel bad or anything, but the state has been asking this. Have you ever been convicted of a felony?

A. No.

Q. Have you talked with any of these gentlemen over here about this?

A. No.

Q. Have you—did you know them before you came up here today? Before this case came up?

A. No.

Q. Have you talked with other prospective jurors out there about this case?

A. No. I just found out just a few minutes ago what it was about. About 5 minutes before I came in here.

Q. You haven't discussed it with anybody?

A. No. There was two of us in the room, and the other fellow was a colored fellow,—

[fol. 469] And you are telling this court and you are telling me that these eight Negro defendants, whose life and liberty are at stake here, that, notwithstanding the fact of your completely white background, notwithstanding he fact that you have never had any desire to associate with Negroes,—or accord them any recognition whatsoever, that in that situation, and in view of the state regarding the exclusionary policy of the B & W, that you think you can give them a fair trial on an indictment which charges them with obstructing trade because they went there and tried to get in the restaurant?

Mr. Nichol: If your Honor please, that's a limited question. It is only a piecemeal and partial of the case, and it is designed to get—

The Court: If you will ask him if he will give them a fair trial on the presentment in this case, you may ask him,—in spite of all those things.

Mr. Williams: May it please the Court, I would like to read the indictment to him.

The Court: Well, you may ask him about that. You may ask him, in spite of all those things, if he thinks he can give the defendants a fair and impartial trial, on this case.

A. I would answer it the same way. I am sure that I would be honest in my opinion.

Mr. Williams: Sure you would do what?

A. I am sure I could give an honest opinion as to the [fol. 470] guilty or not guilty regardless of who they were.

Q. Well, sir, I would like to read the indictment to you.

Mr. Nichol: We object, if your Honor please.

Mr. Williams: They object to my reading it to you.

Mr. Nichol: We except to that, if your Honor please.

The Court: Gentlemen, let's not waste any time. The Court declares this witness competent. Now, the Court declares this witness competent. Do you take him, or do you not?

Mr. Williams: May it please your Honor, we respectfully request that this witness be excused for cause on the grounds that this witness has admitted that he has associated only with white people, on the basis of equality, had nothing to do with Negroes, except when he was a child and they would play in the backyard,—play basketball in the backyard with them, and therefore, it would be a denial of the constitutional right of these Defendants, under the state and the federal constitutions, to a jury of their peers, to require them to accept this juror.

The Court: The Court overrules your motion.

Mr. Williams: We respectfully except, and, moreover, if the Court please, we respectfully except to your Honor's action in limiting us in the examination of this witness; and refusing to allow us to read the indictment after directing us that we can not examine him on parts of the [fol. 471] indictment, and refusing to allow us to read the whole indictment.

The Court: All right, sir. Now,—

Mr. Williams: And now, if your Honor please,—

The Court: Do you accept, or do you pre-emptorily challenge the juror?

Mr. Williams: May it please the Court, we do not accept this witness but we do not prefer to use one of our pre-emptory challenges,—

The Court: You will have to do one of the two, gentlemen.

Mr. Williams: Well, if your Honor please, we respectfully submit that we—

The Court: If you don't use a pre-emptory challenge, then the Court will seat him.

Mr. Williams: Well, Sir, we decline to challenge him pre-emptorily.

Mr. Nichol: Now, if your Honor please, we say it is the duty of the Court for this practicing attorney to require and demand of him that he challenge one—that he name which one of his several defendants used for the challenge.

Mr. Looby: If your Honor please,—

Mr. Nichol: It is the duty of the Court—it is his duty to see that he does it.

Mr. Looby: It is not up to us to determine something [fol. 472] as it is demanded of us.

The Court: That is true. That is just a suggestion of his. I will finally determine that. What are you going to do with this juror?

Mr. Looby: We take this position, your Honor. We are limited on pre-emptory challenges. Now, with the Court action—the Court prerogative which says that if we don't use one of our pre-emptory challenges, he will seat him as a juror. That's the Courts,—probably the Court has that right. And we don't challenge that. We can't. So the Court will seat him.

The Court: Now, if you don't exercise the challenge when you have it, you can't complain if the Court seats him.

Mr. Looby: We are not going to complain,—, if your Honor please.

Mr. Maddin: Let the record show that clearly.

The Court: You don't complain at the Court picking the juror?

By Mr. Looby:

A. May it please your Honor, we are limited in our pre-emptory challenges. We may need them later. We don't have too many.

Mr. Nichol: You have 5 left.

Mr. Looby: We would prefer to reserve those 5, if your Honor please. We don't want to use up all those challenges now.

Mr. Nichol: That makes him a juryman, if the state understands the law. Now that he declines the pre-emptory [fol. 473] challenge—now he is a juror.

Mr. Looby: The defendants challenged him for cause, and it was overruled by the Court.

The Court: The Court now seats him.

Mr. Looby: If your Honor please, there is no question about that, that he is properly seated.

The Court: All right.

Mr. Nichol: Did the Court hold that he did not exercise the challenge? He declined the pre-emptory challenge.

The Court: That is what they said. And I want the record to show that there were 5 pre-emptory challenges available to the defendant. All right. Call a name. Wait a minute, I think, gentlemen, now is the time to bring that box in here and get some more jurors. We have to have some more jurors, and draw some more jurors.

(The jury box is brought in and the Reporter is told to draw, blindfolded by the hands of the Court Officer, names for another jury panel for the next day. Names are drawn, counted, and given to the secretary of the Court to make lists for court officers to get busy on, so that a second special panel may be available.)

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[fol. 510] (#87, GRANVILLE WILLIAMS, called as a prospective juror, is sworn and examined by the Clerk.)

The Court: He is competent.

Examination.

By Mr. Robinson:

Q. Mr. Williams, you live on North 6th Street?
A. Right.
Q. Where did you live before that?
A. 1031 18th Avenue, North.
Q. How long have you lived in Davidson County?
A. All my life. Born here.
Q. What is your occupation, Mr. Williams?
A. Foreman at National Baptist Publishing Board.
Q. Sir?
A. Foreman at the National Baptist Publishing Board.
Q. What religious faith are you?
A. Methodist.
Q. Where do you go to church?

[fol. 511] A. On Knowles Street 1815 Knowles Street. Community Church.

Q. Were you educated here in Davidson Co.?

A. Yes.

Q. Where?

A. Cameron and Pearl High.

Q. Cameron and Pearl High?

A. Yes.

Q. You have children?

A. No.

Q. Are you a married man?

A. Yes.

Q. But have no children?

A. No.

Q. Did you ever attend college at A & I, Meharry or Fisk?

A. No.

Q. Never did?

A. No, sir.

Q. Do you belong to any organizations that advocate integration or segregation?

A. No.

Q. Have you attended such meetings? That advocate integration or segregation?

A. No.

[fol. 512] Q. Have you ever attended any meetings of that sort?

A. No. I don't think so.

Q. Do you know any of these defendants?

A. Not personally.

Q. Look at them good.

A. I don't know them.

Q. Not personally? Have you seen them?

A. I might have seen them. I won't say that I haven't seen them.

Q. Well, now, which one have you seen? You intimated that you have seen one of them. Have you ever seen John Lewis?

A. I don't know anyone by name, I mean.

Q. Well, pick me one out by faces that you have seen before.

A. Well, I am not for sure. A lot of faces look familiar to me, but just to say I know them—I couldn't say that I know them personally.

Q. Well, have you seen any of them before?

A. Not knowing that I have seen them. I might have seen them but not knowing them. That is what I am speaking about. In other words, I could have seen them, but just knowing them off-hand, I couldn't just say I have seen any one in particular.

[fol. 513] Q. Uh-huh. You used to live on 18th Avenue, North?

A. That's right.

Q. How far from Fisk University?

A. Across the street.

Q. Right across the street?

A. Yes.

Q. When was that?

A. 11 years ago. I have been living in East Nashville about 10 years now.

Q. Have you ever been represented by either one of the attorneys for the defendants?

A. No.

Q. Do you know Mr. Looby and Mr. Williams?

A. I know Mr. Looby.

Mr. Williams: May your Honor please, I am not as well known as he thinks I am.

Mr. Robinson: Do you know Mr. Williams? Avon Williams?

A. No, I don't know him.

Q. You don't know him?

A. No.

Q. Have you ever had any business dealings with Mr. Looby?

A. No.

Q. You have not?

A. No.

[fol. 514] Q. You know Mr. Looby as the councilman?

A. Yes.

Q. That is as far as you—where did you say you work?

A. 523 Second Avenue, North, about two blocks down the street.

Q. Is that right across the street from the H. G. Hill Company?

A. Right.

Q. You have a cafeteria down there?

A. No.

Q. Have you discussed down there, or with the people that work with you, any matters relative to the case involving the B & W cafeteria and these defendants?

A. It has been talked about. I wouldn't say I didn't talk about it.

Q. What has been discussed?

A. I couldn't say specifically about any conversation.

Q. What, generally, has been discussed? Relative to the case?

Mr. Williams: If the Court please, we object to that.

Mr. Robinson: That can be asked.

Q. If there are not any facts.

[fol. 515] Mr. Robinson: I am asking him, if your Honor please, to determine if he has any personal working knowledge about this case.

The Court: About the facts.

Mr. Robinson: Yes, about the facts. That's exactly what I asked him.

The Court: Well, about the facts.

Mr. Robinson: Have you discussed the facts down at the Baptist Publishing place?

A. As I say, I have talked about the incident.

Q. Well, what has been discussed. I'm not asking you to tell me any details—every word. Just generally what has been discussed? Just generally.

A. Well, wasn't anything in particular, that we talked about even.

Q. From your talks about it, have you developed an opinion about it?

A. Well—

Q. As to the guilt or innocence of these defendants?

A. No, I didn't develop any decision over the thing, at all. I mean, it was just a matter that we talked about.

Q. You don't know what you talked about?

[fol. 516] A. We knew what was happening,—it was just a matter that was happening.

Q. Have you discussed with anybody else today about this case at the B & W? that we have under consideration?

A. No, I haven't discussed it today, no.

Q. Do you have an opinion as to the guilt or innocence of these defendants in the matter at the B & W?

Mr. Williams: I object to that if the Court please. He has already answered that.

The Court: I think he did. I really think he did. But you can say yes or no.

Juror: What type of opinion would you like to know? I don't know the details. As to the guilt or innocence?

The Court: That's all they can ask you about.

A. Well, I don't know the full details of it and I couldn't say whether they was guilty or not.

Mr. Robinson: We will excuse him.

Mr. Looby: Let the record show this man is a Negro.

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[fol. 659]

(#71, W. T. Moon, a prospective juror, is sworn and examined by the Clerk.)

The Court: He is competent.

Examination.

By Mr. Robinson:

Q. Mr. Moon, where is Maplehurst Lane?

[fol. 660] A. Between Granny White and Lealand Lane. In front of David Lipscomb, but I don't live there.

Q. Where do you live?

A. 831 Redwood Drive.

Q. Is that off Franklin Road?

A. Yes, sir.

Q. What is your business? Mr. Moon?

A. Banking.

Q. Where?

A. Commerce Union, Broadway Office.

Q. Broadway office? Mr. Moon, do you subscribe to the basic principle that in order to convict a defendant, that he must be guilty beyond a reasonable doubt?

A. Yes.

Q. You believe in that?

A. Yes, sir.

Q. On the other hand, is it your belief that the defendants—the defendant in a criminal case does not have to take the witness stand at all on his behalf, and that he has a witness—the presumption of law that he is innocent that stands for him irrespective of whether or not he takes the stand?

A. Yes, sir.

Q. Do you believe in that principle?

A. Yes, sir.

Q. If selected as a juror, can you sit in that jury box [fol. 661] and listen to the evidence as the witnesses testify, and hear the Court's charge as to the law in Tennessee, and after you have heard the facts and the law, as stated in open court, can you then decide this matter on a fair and impartial basis for both sides—the state and the defendants?

A. Yes, I believe I could, sir.

Q. Do you have any special knowledge of the facts in this case where these defendants allegedly went to the B & W restaurant on 6th Avenue, and as a result of the activity there, were allegedly charged with conspiracy? Do you have any special knowledge of the facts?

A. No, sir, I don't.

Q. Do you have any knowledge at all of the law involved, at the present time.

A. No, I don't.

Q. Would you accept what his Honor says is the law in this state, as being the law in this state—would you accept what the Judge says about that?

A. Yes, sir, I would.

Q. Do you have children?

A. Yes, sir. I do.

Q. Are they in school?

A. An 8-year-old daughter.

Q. 8-year-old daughter? Just one child?

A. Yes.

[fol. 662] Q. Do you have—what is your religious belief? What denomination?

A. Denomination? Presbyterian.

Q. Is there anything in your religious belief or anything else in the world that would keep you from rendering a fair decision in this case, paying attention only to what you hear from the witness stand, from the proof, and applying that testimony, or those facts, to the Court's charge, and decide this on a fair basis, both for the state and for these defendants?

A. No, sir, there is not.

Q. Nothing at all?

A. No, sir.

Q. He is satisfactory to the state.

Examination.

By Mr. Looby:

Q. Mr. Moon, do you know Mr. Maddin or Mr. Robinson?

A. No, I don't.

Q. They haven't done any business with the bank where you are connected?

A. No, sir. Not to my knowledge.

Q. What bank are you connected with?

A. Broadway office of Commerce Union.

Q. Do they have Negro customers there?

A. Yes, sir.

Q. What is your position?

[fol. 663] A. Assistant Vice-President.

Q. And manager of that branch?

A. Installment Loan. Manager of the Installment Loan Dept.

Q. Are you familiar with sit-in demonstrations?

A. I have read something in the paper about sit-in demonstrations, That is all the knowledge I have.

Q. Have you formed any opinion?

Mr. Maddin: We object, your Honor, to the general question.

The Court: As to the general question, yes, sir. Ask him about the B & W incident.

Mr. Looby: You have heard about the sit-in demonstration at the B & W Cafeteria?

A. I just noticed it in the headlines. I didn't read the article as such.

Q. But you didn't form any opinion of it?

A. No.

Q. As to right or wrong?

A. No, sir, I did not form an opinion.

Q. Mr. Moon, do you know Mr. Moon of the Moon-McGrath Drug Store?

A. Repeat that, sir.

Q. Do you know Mr. Moon of the Moon-McGrath Drug Store uptown? On Union Street?

A. Moon Drug Company? No, sir, I don't know him.

[fol. 664] Q. I think they own a drug company on Union Street—Moon-McGrath.

A. Well, I have never met this gentleman, sir.

Q. Have you ever observed any sit-in demonstrations?

A. Repeat it, sir.

Q. Have you ever observed any sit-in demonstrations?

A. No, sir, I haven't.

Q. You know nothing about them?

A. No, sir.

Q. Without reference to the legal interpretation—of course you understand what is meant by the word "obstruction"?

A. Yes.

Q. You know what is meant by that? Are you a graduate of Vanderbilt University?

A. Repeat that, sir.

Q. You are a graduate of Vanderbilt University?

A. No, sir, I am not.

Q. What institution are you a graduate of?

A. I graduated from a business college, in Business Administration.

[fol. 665] Q. What college was that?

A. It is discontinued now.
Q. Can you understand me?
A. This air-conditioner, or something, bothers me.

The Court: I think they have been opening the door there on you too much.

A. I can hear you all right, sir.

Mr. Looby: You can understand me?

A. Yes, sir.
Q. A whole lot of people have a lot of difficulty understanding me.
A. (Smiles pleasantly.)
Q. Sometimes I have difficulty understanding myself. But if you can understand me, we will get on.
A. Yes, sir, I can understand you.
Q. You say you have no prejudice?
A. No, sir.
Q. Mr. Clerk, how many more challenges do we have?

By the Clerk:

A. None.
Q. How did I get out of them? Mr. Moon, are you a native Nashvillian?
A. No, sir. I have lived here about 22 years.
[fol. 666] Q. Where did you come from?
A. Huntsville, Alabama.
Q. About how old a man are you?
A. 43.
Q. And you say you are a member of the Presbyterian Church?
A. Yes, sir.
Q. What Presbyterian Church?
A. Glen Leven Presbyterian Church.
Q. And that is a white church?
A. Yes, sir.
Q. By white church I mean that its membership is restricted only to white people?
A. And we have have white members.
Q. Sir?

A. Just white members.

Q. Just white members? And the school from which you graduated was a completely white school?

A. Yes, sir.

Q. Do you belong to any organizations that advocate segregation?

A. No, sir, I do not.

Q. Have you ever belonged to any such organization?

A. No, sir, I haven't.

[fol. 667] Q. Have you ever attended any of the meetings, or any meeting, of any such organization which advocates segregation?

A. No, I haven't.

Q. Where do you live?

A. 831 Redwood Drive.

Q. And that is an exclusively white neighborhood?

A. Yes. About ¾ mile this side of Brentwood, Tennessee.

Q. And that section is an exclusively white neighborhood, isn't it?

A. Yes, sir.

Q. Do you have any Negro friends?

A. Yes, sir.

Q. They visit you?

A. No, sir.

Q. You visit them?

A. No, sir.

Q. Well, what is your friendship?

A. Just a business relationship.

Q. At your bank?

A. Yes.

Q. Nothing closer than bank relations?

A. Repeat that, please.

[fol. 668] Q. Nothing closer than business relations?

A. Mostly business needs, yes, sir.

Q. Do they deposit at your bank?

A. Yes, sir.

Q. Mostly business nature?

A. Mostly business nature, yes, sir.

Q. What other relation beside business?

A. Well, there's some church groups that I know, that I talk to a lot.

Q. In your church group?

A. Well, in the Presbyterian churches.

Q. Negro Presbyterian groups?

A. Yes, I have talked to some of them.

Q. Well, my associate, Mr. Williams, who happens to be out today, would like that announcement. He is an elder in the Presbyterian Church. You don't know him, do you?

A. No, sir.

Q. He belongs to the St. Andrews Presbyterian Church. That's a Negro Presbyterian Church.

But all of your associations, Mr. Moon, have been—religious, social, education—have been all with exclusively whites?

A. Yes, sir.

Q. If your Honor please, the state of Tennessee is prosecuting this case, has insisted on a trial by jury. The De- [fol. 669] fendants then demurred and asked for a trial without a jury. But the Court, following the dictates of the Tennessee Code, ruled that it must be a trial by jury.

Now, since the trial is by jury, I respectfully insist that the trial, under the constitutional rights of the defendants, should be—that the trial jury should be of peers, and by no stretch of the imagination could Mr. Moon be considered to be the Defendants' peer. These 8 Negroes, charged with an offense that involved directly a crossing of the racial bar, require, and demand, and insist that they be tried by a jury of their peers. We, therefore, challenge this venireman for cause.

The Court: Respectfully overrule your challenge.

Mr. Looby: We respectfully except, and if your Honor please, we are obligated—the Clerk informed us that we have exhausted our number of pre-emptory challenges to which we are entitled, and therefore under those circumstances we are obligated—we have no further pre-emptory challenges, so we are forced to accept this juror.

The Court: Take him upstairs to be seated as a juror.

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[fol. 751] (#96, WENDALL H. COOPER is called as a prospective juror, is sworn and examined by the clerk.)

The Court: He is competent.

Examination.

By Mr. Butler:

Q. Mr. Cooper, you have just told the clerk that you have not formed or expressed any opinion as to the guilt or innocence of these defendants, under this charge.

A. I take it you didn't even know what this case is about?

A. That's right.

Q. So knowing nothing about it, you could listen to the evidence, if you were selected to be a juror, and try to learn what the case was about, and upon the Judge's charge, and upon those two things, and those two things alone, render a verdict, would you not, that would be a fair and impartial verdict?

A. I could.

Q. A verdict that would be fair to the state and the defendants—the 8 defendants?

A. I could.

Q. Mr. Cooper, do you know anything at all that would [fol. 752] prohibit or prevent you from doing that?

A. No, sir.

Q. Do you know anything at all about this—do you know what is involved?

A. I have just heard that it involves sit-ins, that's all I know.

Q. You know none of the people involved?

A. No.

Q. You have no personal interest in it, or the outcome of it, other than to do justice?

A. No, sir.

Q. Satisfactory to the state.

Examination.

By Mr. Looby:

Q. Mr. Cooper, you heard that this case involves sit-ins?

A. Yes, sir.

Q. At the B & W Cafeteria?

A. I don't know where.

Q. But you heard this case being called involved sit-ins?

A. Yes, sir.

Q. Have you formed an opinion about it?

A. No.

Q. As to whether it right or wrong?

[fol. 753] A. No.

Q. You have no special knowledge about it?

A. No.

Q. Do you have any special desire to serve on this jury?

A. None except that it involves my duty as a citizen.

Q. Sir—

A. Except it involves my duty as a citizen to serve as a juryman.

Q. Have you ever served as a juror before?

A. No, sir.

Q. You never served before?

A. No, sir.

Q. Do you know that—if you are selected as a juror to try this case, and these 8 defendants—and the state puts on its proof, and they don't say a word—just sit there, say nothing, do nothing,—

A. I didn't understand the question.

Q. I haven't asked the question yet. If the state puts on its proof, and you are selected to try this case, and the defendants sit there quietly, and say nothing, do nothing, hear nothing, and never say a word, in their own defense, [fol. 754] would you hold that against them?

A. No.

Q. You wouldn't?

A. No.

Q. Why?

A. It is a man's right not to testify if he chooses not to.

Q. And you wouldn't hold that against them?

A. No.

Q. You understand that the state is under the obligation to prove, beyond a reasonable doubt, their guilt?

A. Yes, sir.

Q. You know nothing about the law?

A. No.

Q. You have been instructed as to what is required of the state and the defendants in a criminal prosecution?

A. No.

Q. Do you know what is meant by conspiracy?
A. Vaguely, sir. Not specifically.
Q. Do you know what is meant by obstruction?
A. Yes.
[fol. 755] Q. And what is meant by preventing?
A. Yes.
Q. Do you know what this case is about?
A. Except that it involves sit-ins is all I know.
Q. And you have no opinion about sit-ins as to whether they are right or wrong?
A. No.
Q. Where did you say you are employed?
A. I didn't understand the question.
Q. Where are you employed?
A. TVA—Federal Government.
Q. How long have you been with the TVA?
A. Since 1951.
Q. You have been stationed here in this country since 1951?
A. Yes.
Q. How long have you lived in Davidson County?
A. Since 1951, I got out of service at that time.
Q. What did you do before that?
A. I was in service.
Q. Where before that time?
[fol. 756] A. Cannon County. Auburntown, Tennessee.
Q. And that is your home town?
A. Yes.
Q. Have you ever served on a criminal jury before?
A. No, sir.
Q. Have you ever been a member of or belonged to any organization that advocates segregation?
A. No, sir.
Q. Have you ever—are you a member of any organization now?
A. No.
Q. Have you ever attended any meetings for which segregation was advocated?
A. No.
Q. What church are you a member of?
A. Church of Christ.

Q. What church?
A. Jackson Park Church of Christ, Gallatin Road.
Q. That's an all white church?
A. Yes.
Q. Where did you go to school?
A. Auburntown, Tennessee.
Q. Is that a white school?
[fol. 757] A. Yes.
Q. Have you any Negro friends?
A. No.
Q. Do you work with them?
A. No, we have none where I work.
Q. You live in an exclusively white neighborhood?
A. Yes.
Q. So all of your associations have been on a segregated basis?
A. Yes.
Q. Do you know any of these lawyers at the table there?

(Points to counsel for the state and the B & W Cafeteria.)

A. No.
Q. Do you know Gen. Nichol?
A. Except what I have read of him in the paper.
Q. The one that pops in and pops out every now and then?
A. Sir?
Q. You know him?
A. Except what I have read of him in the paper. I don't know if I would know him if I saw him or not.

Mr. Robinson: Speaking of popping in and out, where [fol. 758] is Mr. Williams?
Mr. Looby: Where do you live?

A. 1010 Calvert Street, Nashville.
Q. You have a family?
A. No children. A wife. I am married.
Q. What has your educational background been?
A. I have a high school education—12 years in high school, and after that went to the Navy and went to technical school, storekeeper school in the Navy.
Q. Did you go to all white schools?

A. Except in the Navy. Two years.

Q. And your association there was compulsory? You had no voluntary association with Negroes?

A. With some I did. At home we had Negroes—in Cannon County—and I had no inhibitions to being friends with them. If that is what you mean, sir.

Q. What associations with them?

A. Oh, casual friends just like a child will strike up with anyone in a small town.

Q. Did you ever visit in their homes?

A. I don't recall so.

Q. Did they visit you?

A. No.

Q. Your social and economic background and every phase [fol. 759] has been on a segregated basis, has it not?

A. Except that period of time when I was in the service, and it was not.

Q. But all of your associations—whatever kind they have been, other than that, have been on a segregated basis?

A. Yes, that's right.

Q. You say you just know Mr. Nichol when you see him?

A. I don't know if I know him when I see him,—I have seen his picture in the paper.

Q. Now, let's go back and see if I understand, Mr. Cooper. I think I understood it before, but I want to be sure to get it in the record. Is it true that all of your life from the time of birth up to the present, with the exception of the U. S. Navy, which was compulsory,—all your associations have been on a segregated basis?

A. Yes, that is right.

Q. If your Honor please, on the basis of this gentleman's admission that he has lived a completely segregated life, he has no association on a basis of equality with Negroes, that he doesn't speak the language that the Negroes speak, and doesn't think what the Negroes think—

Mr. Maddin: Now, if your Honor please, that is certainly not in the record, here.

[fol. 760] The Court: Just let him speak. He is talking for the record now.

Mr. Maddin: All right. I will withdraw my objection.

The Court: Go ahead. He's putting it in there.

Mr. Looby: On the basis of all his admissions of a completely segregated life, we insist, if your Honor please, that he is not one of the peers of these defendants.

The state insisted, and still insists on a trial by jury. We were willing to waive, and did waive a trial by jury, but we insist that if we are to have a trial by jury, our constitutional rights must be protected, and they should be tried by a jury of their peers; that by no stretch of the imagination could one classify this man as one of the peers of the defendants. We, therefore, challenge him for cause.

The Court: The Court will respectfully overrule your challenge, sir.

Mr. Looby: We respectfully except, your Honor.

The Court: The Court will seat the juror. Take him upstairs and I think that makes 12.

Clerk: Yes, sir.

The Court: All right. Gentlemen, let me inquire of Counsel now. Do either of you, either for the state or defense, see the need of a 13th juror? Frankly, the Court does not, but—

(After each prospective juror was accepted, both by counsel for the State and counsel for the defendants, and was told to take a seat in the jury box, in every case, without exception, the juror was taken from the courtroom, upstairs to the regular jury room and to the quarters furnished for the Jury.)

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[fol. 763] The Court: All right. Swear the jury. The jury is here.

(Clerk swears the jury.)

The Court: All right, Gentlemen for the State, you will read the presentment to the jury.

(Mr. Robinson reads the presentment to the jury.)

The Court: The pleas of the defendants.

Mr. Looby: Does your Honor have a copy of the indictment?

The Court: I do, now.

Mr. Looby: I call your Honor's attention to the second paragraph of the indictment beginning about the 7th line "to violate Code Section 39-1101-(7) and Code Section 62-711."

Now if your Honor please, there are charges in this indictment, and I move the Court that the state be required to elect which of these separate sections they have chosen to prosecute.

The Court: That motion will have to be overruled.

Mr. Looby: To which we respectfully except, if your Honor please.

Now, come the defendants, and to the presentment, and to each and every count thereof, the defendants plead not guilty.

[fol. 764] The Court: All right. Get the witnesses who are going to testify in the case, please.

Mr. Norman: All the witnesses who are going to testify in this case, come around.

The Court: You who are going to testify hold up your hands and let the clerk administer the solemn oath.

(Clerk administers the oath to the witnesses.)

The Court: Will the rule be called for?

Mr. Looby: Yes, sir.

The Court: All right. Now, let me admonish the witnesses, please. You witnesses will be under the rule. You will not discuss the case among yourselves, with any witness who has already testified, with any witness who will testify, only discuss the matter with counsel, either for the state or for the defendants.

(The witnesses pass from the room and the officer goes after Mr. Carrier.)

The Court: The state will offer its first witness.

EVIDENCE ON BEHALF OF THE STATE:

WOODROW WILSON CARRIER, called as a witness on behalf of the state, being first duly sworn, testified as follows:

Direct examination.

[fol. 765] By Mr. Maddin:

Q. State your name, please.
A. My name is Woodrow Wilson Carrier.
Q. Where are you employed, Mr. Carrier?
A. I am employed by the B & W Cafeteria Company as Manager of 6th Avenue, store.
Q. How long have you so been employed?
A. 15 years at this store.
Q. Immediately prior to and for months preceding that—prior to October 21, 1962, what was the policy of B & W Cafeteria, with regard to its patrons?

Mr. Looby: I am going to object to that. This Court isn't here to enforce policies, and what's included in those policies.

The Court: Well, there are certain allegations in this presentment, gentlemen, with reference to what they did or did not do.

Mr. Looby: But your Honor, whatever the policy of the company may have been, that is not germane. A policy is not law. The Court does not enforce policies on individuals, whether they are corporations or natural persons.

The Court: I shall have to overrule your objection.

Mr. Looby: We respectfully except.

Mr. Maddin: Go ahead.

[fol. 766] A. The policy of the B & W Cafeteria had been to operate a cafeteria, serving only white people.
Q. What is the approximate seating capacity of the B & W?
A. About 450 seats.
Q. Now, on this date, Sunday, October 21, 1962, did anything unusual occur at your place as respects your patrons?
A. Well, at about 12:20, one customer came to the kitchen, or serving counter where I was, and said there was—

Mr. Looby: I object, if your Honor please, to what was said; unless it was in the presence of these defendants.

The Court: Sustained.

Mr. Maddin: Someone came and spoke to you?

A. Yes.

Q. As a consequence of that, what did you do—go somewhere?

A. I went to the front door where I discovered a large gathering of people on the inside—on the outside, and 8 young Negroes were in the vestibule, in between the two doors.

Q. All right, sir. Now, before describing what occurred there, let me give the Court and jury the benefit of the [fol. 767] description of the vestibule, of the store which is located on 6th Avenue, Nashville, Tennessee. Is that right?

A. Yes.

Q. What stores are next to it?

A. Well, the Sam Small Jewelry on one side, and the Chayburke's Furrier on the other side, and across the street, the Eastern Airlines Office, the Cross Keys restaurant, the Hermitage Hotel.

Q. Now, then, would you describe the vestibule area. How you go from the side walk into the entrance where they were?

A. Well, there is an entrance. There are 2 swinging doors from the sidewalk into this cubicle, which I would imagine is about 4 ft. x 4 ft., and then two other doors entering the dining room proper from that cubicle.

Q. Now, those doors—do they swing both ways?

A. Yes.

Q. For the sake of the record, there are 2—

A. Two double doors.

Q. Two double doors?

A. Yes.

Q. One at the outside of the street, and one into the interior?

A. Yes, sir.

[fol. 768] Q. That goes into the cafeteria?

A. Yes, sir.

Q. Now, what is the distance between them?

A. I would say approximately 4 feet.

Q. Now, in this area, you said you saw what in this cubicle area, set off by swinging doors?

A. Well, there were—there were 8 young Negro boys in that area at that time.

Q. Where the patrons—where else were persons seeking to get out of the cafeteria?

A. Well, there were people on the 6th Avenue entrance, attempting to—who had come to be served and there were some people in the dining room proper who had already had their lunch and were leaving.

Q. Can you estimate the number of people on the outside?

A. No, I can't.

Q. On the inside?

A. On the inside there must have been—there could have been a hundred or a hundred and fifty people on the inside.

Q. Now, at the time you arrived at the door, how many of them were there waiting to get out?

A. Well,—

Q. So far as you could determine?

A. I recall 3 or 4 at least. And, of course it was a [fol. 769] continuing thing, with others coming up all the while.

Q. Did you have a doorman?

A. Yes, sir, we did have.

Q. Where was he?

A. He was—

Q. —with respect to the inside swinging doors?

A. Well, he was at the inside swinging doors, with the doors closed against the entry of these people in the vestibule.

Q. Did you overhear any conversations between him and the 8 defendants?

A. Well, he had just told them that we were—he was in the process of telling them that we didn't serve—

Mr. Looby: I object to him being in the process of telling them—

The Court: If you heard what he said to them.

A. I—

The Court: You may relate that.

A. I did, sir. He said that we didn't serve Negroes, and that he wished that they would go ahead and not make any trouble for us.

Q. Did you all hear any response?

[fol. 770] A. At that point, I don't think I did.

Q. Did you have a conversation with them?

A. Not at that point.

Q. All right. Tell me whether any customers, or persons,—white persons, seeking entrance into the cafe, were able to do so?

A. Well, there were a few people who managed to squeeze through the crowd in the vestibule, and likewise there were some few people who managed to get through the vestibule going out.

Q. What occurred to those persons when they attempted to gain access into the cafeteria, or leave?

A. Well, it was a little crowded, right through there, and there seemed to be some feelings—strong feelings developing on the part of one or two who were trying to get through.

Mr. Looby: He can't tell only just what he said or did, if your Honor please.

The Court: Yes, you may relate what was said or done there by the defendants and others, but he objects to your stating that it seemed like strong feelings has arisen.

Q. Did you—would you tell to the Court and Jury was there ease, or lack of ease, for them to pass through there?

A. It was most difficult, because of the formation of the [fol. 771] individuals. The vestibule area, as I say, was well crowded,—

Q. What, if any, physical activity other than the effort to walk through, did you observe?

A. I don't recall any.

Q. Now, you indicated that at the time of the conversation which you first described, a moment ago, you did not have any conversation, will you tell us what occurred to lead up to the time when you did have such conversation.

A. In the meantime I had decided that I would call the police which I did, and asked if they could give us some help. Shortly thereafter, the officers came and I believe that I went through the vestibule and went out on the street to meet them as I saw the car arrive, and I stated that it looked like I needed some help, that my business was being pretty well blocked, and the patrolman said that he would have to call the—

Q. No need to go into the conversation with the patrolman, but as a result, of the conversation, what happened? So far as the law enforcement agency being there?

A. They arrived.

Q. Additional law enforcement agency?

A. No, the two. There were two officers who arrived about that time.

Q. Were there more than two police officers ultimately?

A. The—when I stated my situation to these officers, [fol. 772] one of them replied that he would have to get the Sergeant, or the Sgt. was on his way over there. And it wasn't but a few minutes till the Sgt. arrived, and I expressed to him what I felt, and he said—well, they had a conference, and in a few minutes, the officers were escorting these young men into the—out to the sidewalk and into the patrol wagon.

Q. Now, Mr. Carrier, from the first time that you became aware of the blocking of the vestibule until these 8 young Negro boys were removed by the police department, approximately what time elapsed?

A. Approximately 20 to 25 minutes, I would say.

Q. Now, this commenced at what time?

A. 12:20 or 25.

Q. And how did that relate to your volume of business on Sundays?

A. Of course on Sundays, it is the after-church business that is predominant, and the people we were attracting, we would have gotten in that period normally.

Q. As you attempted to pass through the vestibule, what, if anything, occurred?

A. Well, actually, nothing, sir. The—the young men were standing in position, and it was just a matter of my easing through the crowd.

Q. Did you have any conversation with them yourself?
[fol. 773] A. At that particular time?

Q. Any conversation other than the one you described a moment ago.

A. I believe that I asked the boys to step back and let a lady who had asked me—she indicated—she said she had heart trouble, and would I please help her get out, and I just said, Gentlemen, will you let this lady out? And I believe that I maybe asked the second time, and the lady did work her way out onto 6th Avenue.

Q. Was she given ready access to 6th Avenue, or not?

A. I would say reluctantly.

Q. After you had asked?

A. Yes.

Q. Now, what, if other conversation, did you over-hear between your doorman and these 8 Negroes?—

Mr. Looby: If your Honor please, I object to these defendants being referred to as Negroes. If they will say defendants, it will be all right, but I am objecting to them referring to them as Negroes.

The Court: Confine it to the conversation you had with the defendants.

Mr. Maddin: That is all I am asking—my question to you, sir, is what conversation did you over-hear between [fol. 774] the doorman and these defendants?

A: Other than the continuous urging of Mr. Williams to these people to move on, I can't recall that I heard anything.

Q. But you did hear continual urging by him to these defendants to move on?

A. Yes.

Q. Did they, in any way, respond to him either by action, or words?

A. No, sir. No, sir. There wasn't any.

Q. What would you estimate to be the time lapse between the time you first heard him urging them to move on, and the time of having them moved?

A. I would say 20 to 25 minutes.

Q. Mr. Carrier, have there been any prior occurrences similar to this at your place of business?

Mr. Looby: I object, if your Honor please. His Honor has restricted me to this case and this case alone

The Court: Yes, stick to this case.

Mr. Maddin: Yes, sir. Mr. Carrier, are you acquainted with any of the restaurants in the downtown area that do serves Negroes, on Sunday noon?

A. Sunday noon? Honestly, I haven't been in another restaurant downtown on Sunday noon in many years and for that reason, I could not say if there was one, or not.

[fol. 775] Q. Insofar as the downtown area is concerned?

A. Yes, sir. Yes, sir.

Q. Now these occurrences, that you have mentioned, took place at the B & W Cafeteria on 6th Avenue?

A. Yes, sir.

Q. In Nashville, Davidson County, Tenn.?

A. Yes, sir.

Q. You may cross examine.

Cross examination.

By Mr. Looby:

Q. I believe you are Mr. Carrier?

A. Yes, sir.

Q. Mr. Carrier, you gave the Attorney General some information from which he brought this indictment?

A. I beg your pardon, sir.

Q. Did you give the attorney general some information on which he based or drew up this indictment?

A. I did not discuss this matter with anyone other than Counsel for B & W until I was—well—

Q. I see. Did these young men inform you they were seeking service?

A. Yes, sir.

Q. And you were open to the public to serve at that time, weren't you?

[fol. 776] A. Yes, sir.

Q. And that's all they asked for was service, wasn't it?

A. Yes, sir.

Q. Now, you had the facilities to serve them? Didn't you?

A. I beg your pardon?
Q. You have the facilities to serve them?
A. We do have.
Q. Was your place of business crowded at the time?
A. It was beginning to be crowded, sir.
Q. Now, the only reason that you didn't serve them was because they were Negroes and not white, wasn't it?
A. Yes, sir.
Q. And the same boys seeking service would have been all right if they were white?
A. Yes, sir.
Q. I think that is all I want to ask him.

CHARLES E. EDWARDS, called as a witness on behalf of the state, being first duly sworn, testified as follows:

[fol. 777] Direct examination.

By Mr. Maddin:

Q. You are Mr. Charles E. Edwards?
A. Yes, sir.
Q. Where are you employed?
A. I am semi-retired now.
Q. And prior to retirement, what did you do?
A. I was with the federal government for about 16 years.
Q. On October 21, 1962, did you have occasion to seek admittance to a restaurant in the downtown area of Nashville?
A. Well, now, on that day, my wife and I attended services at the Downtown Presbyterian Church. When services were over, I walked on up to the cafeteria, and my wife waited at the church for a friend. And I had gotten on the inside prior to this.
Q. The services at the Downtown Presbyterian Church concluded at noon, I presume?
A. That's right.
Q. At approximately what hour did you reach the restaurant?
A. Oh, I imagine it was about 12:20—it would be about that time.

Q. When you went in?

[fol. 778] A. That's right.

Q. And when you went in, what unusual occurrence did you observe?

A. Well, the only unusual occurrence I observed was—Oh, I guess in about 15 minutes from that time—I noticed a couple or the group of Negroes that had entered the vestibule.

Q. Do you recall the number?

A. No, I—really, I didn't count them, but there must have been 6 or 8 of them.

Q. To what extent did they fill the vestibule area?

A. Well, they filled it to the extent that people couldn't get in—couldn't get by them.

Q. Where were you standing with relation to the inside doors there?

A. Well, I was sitting there on the front. They have a little row of chairs for people who wait to sit, and I was sitting in one of those chairs when the incident first started.

Q. Now, is the vestibule closed off in such a way that you can not see into it? Or, if so, how is it that you could see them?

A. Oh, you can see. It is glass.

Q. Did you then, Mr. Edwards, go—would you then go forward and relate the occurrences you observed?

[fol. 779] A. Well, the colored group entered the outside doors into the vestibule, and then they tried to go through the next group of doors—the next two doors. The doorman was standing there, and he refused to let them in.

Q. Did you overhear any statements made by him to the defendants?

A. Yes, I overheard him tell them, We don't feed colored people here. I can't let you in.

Q. Did you hear that on more than one occasion?

A. Yes, I heard it probably 5 or 6 different times.

Q. Within what period of time?

A. Oh, I guess within 15 or 20 minutes. He asked them to go away.

Q. And what response by their answers did he get? When they requested to go away?

A. They remained.

Q. What, if anything, did they do in this vestibule area—how did this affect the persons seeking admittance, or seeking to leave?

A. Well, they had the vestibule blocked so that people couldn't get in or out.

Q. What arrangement was there to control the opening and closing of the doors, interior or anterior, by the persons in the vestibule?

A. None other than I saw—the man who was what you [fol. 780] would say was a doorman—had charge of the doors.

Q. Did you make any observation with reference to the exterior doors?

A. Pardon?

Q. Did you observe anything with reference to the outside doors?

A. Well, only a group of people who were trying to get in to eat—they were at the outside door and out on the sidewalk—they couldn't get in.

Q. In relation to these disturbances which you have been describing, Mr. Edwards, how long after they commenced was it till your wife arrived?

A. Oh, I guess 5 to 10 minutes.

Q. And by that time, approximately how many people had congregated on the outside on the side walk?

A. Oh, roughly an estimate—I would say approximately 75 to 100 people.

Q. Did your wife gain admission prior to the time the police officers removed the defendants?

A. Yes.

Q. Did you observe the occurrences while she was attempting to do so?

A. Well, she had difficulty.

Q. Would you describe the nature of that difficulty?

[fol. 781] A. Well, one of them had his arm on the—what you'd say the door-facing, blocking it.

Q. Which door, sir?

A. The inside door.

Q. Go ahead, sir.

A. And she told them—said my husband is in there, and my two grandsons.

Mr. Looby: I object, if your Honor please, to telling what his wife told him.

Mr. Maddin: I will lay the background.

The Court: All right.

Mr. Maddin: Where were you standing? while this was going on?

A. I was standing to the left—I was standing to the right entering the door.

Q. Inside the restaurant itself?

A. Inside the restaurant.

Q. Did you overhear some remarks?

A. No.

Q. All right, sir. I won't ask you what she said.

Q. Did you observe that she was talking?

A. Yes, I observed that she was saying something.

Q. All right. And what was the nature of the obstruction preventing her from entering?

[fol. 782] A. One of them had their hand on what you call the door facing.

Q. And was he spreading himself across the doorway, or what?

A. More or less.

Q. And after you observed her talking, what happened?

A. You mean with reference to her—

Q. Efforts to get in?

A. Getting in? Well, she just pushed by.

Q. What, if anything, did this person who had his hand across the doorway do, in an effort—to get in at that time?

A. Well, he made several efforts to push himself in. And as he had the chance, any occasion that he thought maybe he could get in, why he tried to go through the door.

Q. Was that one person carrying on that type of conduct, or—

A. No, there was two or three of them. All of them couldn't get in the door at the same time.

Q. When your wife tried to enter the restaurant, was that before or after the statements that you have already described by the doorman telling them that they did not serve Negroes? And to please leave?

A. You mean was his statement before or after she got [fol. 783] in?

Q. Yes, sir?

A. Well, he told—he made that statement before she got in, and afterwards.

Q. I see. Made it on several occasions. Now, what did you see that ultimately relieved the situation?

A. Well, after I guess approximately 30 minutes from the time they arrived, the police arrived, and of course, they cleared the way for people to enter the cafeteria.

Q. Did you go ahead and seat yourself after your wife had gotten inside? And did you remember and observe what occurred?

A. No. We went on after my wife and Fred got in. We went on and seated ourselves and had our meal.

Q. Were you sitting where you could observe the occurrences there in the vestibule?

A. Yes, we were sitting up front, because it was only available at the time. We had gone around and gotten our meal.

Q. Now, prior to the police officers removing the defendants from the vestibule, approximately how many people had gathered outside of the restaurant on the sidewalk?

A. Oh, I'd say 75 or 100 waiting to get in.

Q. Now, Mr. Edwards, while you were seated there at [fol. 784] your table for dinner—having dinner, did you observe the police officers, and what they did with these 8 defendants?

A. Well, when they first arrived, they had them to open—to step back so the people could get in, then they were lined up against the wall.

Q. The wall? Where? in the vestibule?

A. In the vestibule, yes. Then in a few minutes the patrol wagon came and they took them out.

Q. Stopped in front of the place?

A. Yes.

Q. Did you see the patrol officers move them out and take them to the patrol wagon?

A. Yes.

Q. And the same ones that were in the vestibule were taken to the patrol wagon?

A. Yes.

Q. You may cross examine.

Cross examination.

By Mr. Looby:

Q. Mr. Edwards, here—was the juryman—the venireman related to you?

A. Th juryman?

Q. Yes.

A. No.

[fol. 785] Q. The juryman here yesterday?

A. No. He was no relation of mine.

Q. Now, you say the doorman, while these defendants were there,—that the doorman blocked it and wouldn't let them in?

A. He held the door so they couldn't get in.

Q. He held the door?

A. They tried to get in.

Q. I see. He held the door so that nobody could come in or go out, because of the doorman, then?

A. They couldn't go in.

Q. Because the doorman was blocking the door.

A. Yes, he had the door so they couldn't enter.

Q. Yes? So that had he not been there, they would have come in, and nobody else would have blocked them?

A. State your question again.

Q. If the doorman hadn't blocked the door, they would have come in the place, and so the ingress and egress would have been free? Wouldn't it?

A. I suppose, if he had wanted Negroes in, too.

Q. Yes, sir. The doorman was blocking them so that they couldn't come in?

[fol. 786] A. The doorman was holding the door, and the Negroes were blocking the vestibule so that people couldn't get in there.

Q. The doorman was holding the door, so people couldn't come in, after all, could they?

A. No, because the Negroes had it blocked.

Q. Well, the doorman had the Negroes blocked, didn't he?

A. He was keeping them from going in.

Q. So that the doorman was really the one who was keeping these people out, wasn't he?

Mr. Maddin: We object to that question. It is not proper.

The Court: Well, the jury, of course, will determine that.

A. State your question again.

Q. Sir?

A. State your question again.

Mr. Looby: The doorman was the one who was blocking the door and keeping people out?

A. He was holding the Negroes out, and as a result, they had the vestibule blocked, and the other people could not get by.

Q. If he had let the Negroes in, or let the Negroes by, the other people would get by?

A. Had he let them in?

[fol. 787] Q. Yes?

A. I suppose so.

Q. You say 75 to 100 people were outside?

A. Yes.

Q. Do you know what they wanted?

A. They were waiting outside.

Q. And because they—you say there were 75 to 100 people outside when this occurred?

A. I am talking about outside the vestibule.

Q. Do you know what they wanted?

A. They were waiting—I suppose they were waiting to get in.

Q. Because the door was blocked?

A. I suppose they were, yes.

Q. In other words, because there was a crowd blocking the door, that attracted other people, didn't it, all right around there?

A. Well, a great many of them after they opened the doors—the vestibule.

Q. And it was time for church to be letting out? People were just out of church?

A. Pardon?

Q. It was just about time for church to be letting out, and people were just out of church?

A. Oh about 30 minutes after church was out, I suppose.

[fol. 788] Q. People were coming from all directions?

A. I didn't observe the directions because I was on the inside.

Q. But you went there knowing they—you were on the inside, and knowing who they were and what they wanted?

A. I made an estimate of how many might be on the outside.

Q. Are you telling us then, that you knew what they wanted? Whether they were coming in to buy, or not? Is that an estimate of yours?

A. I couldn't—they didn't tell me what they wanted. I don't—

Q. You really don't know whether with those people it was just a matter of curiosity, or whether they just wanted to come in?

A. Well, I know that there was a great many of them that went into the cafeteria after the police had them to open the vestibule.

Q. How many—did any of them leave?

A. Which ones are you referring to?

Q. The people that were supposed to be outside.

A. I don't know whether they left, or not. I was on the inside.

Q. So, Mr. Edwards, how did you know those people [fol. 789] on the outside wanted in?

A. No. I didn't talk with them.

Q. Well, you know that it is a matter of common knowledge that a crowd will gather when something of interest is going on?

You know that happens, don't you?

A. Oh, sure, that happens.

Q. You say that people were coming there in crowds? Did you see Mr. Carrier did when he went down?

A. Yes, sir.

Q. Did you see him when he went down?

A. Yes, sir.

Q. You couldn't see him when he went down, could you?

A. Pardon?

Q. He went down, didn't he? He went down to go out, didn't he?

A. He came down from his office to the door.

Q. He went through the door, didn't he?

A. I don't know whether he went through the door, or not. I saw him on the inside at the door.

Q. Did you see the police when they drove up?

A. I didn't see the police when they drove up.

[fol. 790] Q. Mr. Carrier went out the door, didn't he? And he is no small man?

A. He came down from his office.

Q. He went out the door, didn't he?

A. I didn't see him go out the door.

Q. Do you know who went to call the police?

A. Do I know who went?

Q. Do you know when Mr. Carrier went to call the police?

A. I don't think Mr. Carrier called the police.

Q. Did you see him there at all that day?

A. See who?

Q. Mr. Carrier?

A. I imag—I suppose I did. I talked to him.

Q. Oh, you did talk to him?

A. Yes.

Q. Was that before or after the police came?

A. That was before.

Q. Was it afterward—after he went outside and passed through that same door?

A. I said I didn't see him go outside.

[fol. 791] Q. Well, now, you say you heard this doorman talk to these patrons of color that came to the door? You heard him talking to them?

A. Did he talk to who?

Q. Did you hear him talk to the defendants?

A. Yes.

Q. And did they say they were seeking service?

A. I didn't hear them say that.

Q. Did you know what they were there for?

A. No.

Q. What were you there for?

A. I was there to get a meal.

Q. Meals were being served there at the time?

A. Pardon?

Q. Meals were being served there at the time?

A. Yes, to white people.

Q. Served only to white people. Do you know they were there seeking meals?

A. The assumption was that they were, or they wouldn't have been there.

Q. Now, did you hear the doorman talking to them?

A. I heard him ask them to go away.

[fol. 792] Q. Did you hear any response?

A. No.

Q. You were on the inside?

A. Yes, I was on the inside.

Q. I see. Well—the doorman was on the inside, too?

A. Yes, but he had a little opening where he could talk to them.

Q. You say your wife had difficulty in getting inside?

A. Pardon?

Q. You say your wife had difficulty in getting inside?

A. She had some difficulty, yes.

Q. Did she get in before or after the policemen came?

A. Before.

Q. And you didn't have to do anything to help her get into the place, did you?

A. Pardon?

Q. And you didn't make any effort to help her get into the place?

A. Did I make any effort to get her in?

The Court: To help her get in.

A. No.

Q. She got in without any help from you?

[fol. 793] A. The doorman let her in.

Q. The doorman let her in? Did the doorman let anybody else in?

A. I don't know. As soon as she got in we went on down to the line to get our meals.

Q. Well, before your wife—before he let your wife in, did he let anybody else in?

A. I don't recall whether anybody else got in, or not.

Q. Well, you were right where you could see, weren't you?

A. Yes, I was looking to see when my wife arrived.
Q. Was your wife alone?
A. No. She had a friend with her.
Q. Did both of them get in?
A. They got in together, yes, sir.
Q. Both of them got in together?
A. Pardon?
Q. Both of them got in together?
A. They got in.
Q. But do you know of anyone else who couldn't get in?
A. Do I know of anyone else?
Q. Do you know of anyone else who tried to get in and [fol. 794] couldn't?
A. I saw several people try.
Q. Did you know any of the people?
A. I only knew two who got in—my wife and her friend. I don't know all the people.
Q. But do you know anybody else who couldn't get in?
A. My not knowing them wasn't the cause of them not getting in.
Q. When the police came, what were the defendants doing? or rather where were they?
A. They were crowded up in the vestibule.
Q. Crowded up in the vestibule trying to get served?
A. I don't know whether they were trying to get served, or not. They were trying to get in.
Q. Did you hear them talk to the police?
A. Hear them talk to the police?
Q. Yes?
A. No. When the police came, we were already on the inside.
Q. And did you hear them talk to the police?
A. No, they were out in the vestibule and we were on the inside.
[fol. 795] Q. Now, then, you came here, and you say you saw this group of colored men come to the door into the vestibule. Now, you don't know how many there were, do you?
A. Oh, there's 6 or 8 of them. I didn't count them.
Q. You never saw them before that, did you?
A. No, sir.

Q. You don't know them?
A. I don't know them.
Q. All right. That's all.

The Court: Come down.

Redirect examination.

By Mr. Maddin:

Q. All of the ones that you observed were there were taken away by the police?
A. Yes, sir.
Q. That's all.
A. Thanks, Judge.

Mr. Looby: Wait a minute.
The Court: Wait a minute. Have a seat.

Recross examination.

By Mr. Looby:

Q. Well, now, Mr. Edwards, I understood you to say that when your wife got in, you went back to eat?
[fol. 796] A. I also said that when we got in we came back to the front to a table, and the police took them to the patrol car.
Q. How long were you there before your wife got there?
A. Before my wife got there?
Q. Yes?
A. Oh, I guess 10 or 15 minutes.
Q. And how long were you there before you found this table?
A. Oh, I guess 8 or 10 minutes.
Q. So that the police came at least 25 minutes after you got there?
A. Well, I had been there a few minutes before they came.
Q. That's all.

Mr. Maddin: That's all, Mr. Edwards, come down.

MRS. ANN M. EDWARDS, called as a witness for the state, being first duly sworn, testified as follows:

[fol. 797] Direct examination.

By Mr. Maddin:

Q. Mrs. Edwards, will you state your full name, please.
A. Mrs. Ann M. Edwards. That's the way I sign my maiden name.
Q. Did he come back through here? (This refers to Mr. Edwards who has just testified.)

The Court: He went to get his coat, and I take it—
Mr. Maddin: I just didn't want Councilman Looby to get excited about his whereabouts.
Court Officer: The witness is in the courtroom.
The Court: And I have admonished them, gentlemen, about their behavior.
Mr. Maddin: Mrs. Edwards, on Sunday, October 21, 1962, did you have occasion to go to the B & W Cafeteria for lunch?

A. Yes, I was there.
Q. Following what other activity did you go there?
A. You mean that—
Q. Prior to that, where had you been?
A. We went there from church. We had been to Sunday School and Church.
Q. Were you in the company of anyone else?
[fol. 798] A. I was with two friends who were going, whom we had invited to have dinner with us.
Q. And who were these friends?
A. Mrs. Watkins—she lives in the city. And the other one from Paducah, Mrs. Washam. She doesn't live here.
Q. Now, as I understand it, you came—did you go to the restaurant in company with these two ladies?
A. Yes.
Q. Where was your husband?
A. At the B & W already inside with my grandsons.
Q. And—

A. He was already inside and I waited for one of these ladies to meet me at the church. He and the grandsons went on ahead of me.

Q. Now, when you arrived at the restaurant, what did you observe? Out of the ordinary?

A. Well, before we got half way up the block, we saw all these people milling around outside, white people, and one of my friends said to me, Well, what goes on? And I said, I don't know, but we'll find out.

Mr. Williams: We object to what she said.

The Court: That's right. And the answer is not responsive to the question.

Mrs. Edwards, I think you will do well to listen to the [fol. 799] questions and don't volunteer too much information because those conversations are not competent.

A. No. Well, do you mean what went on after he got to the cafeteria?

Mr. Maddin: What did you observe at the doorway?

A. When we got to the door,—

Q. What did you observe at the doorway?

A. There were these young Negroes—men, all inside—standing inside.

Q. Inside what?

A. Between the two doors,—the double doors.

Q. What happened as you sought to pass through this crowd?

A. They seemed to sort of crowd in, from one side to the other.

Q. What do you mean by "crowd around" Mrs. Edwards?

A. They were in front of us, to the side and around so they were definitely obstructing our entering the cafeteria.

Q. I see. What did you have to do to by-pass by that obstruction?

A. I just sort of elbowed my way through.

Q. I see. Was there any effort to keep you from coming through?

A. No, they didn't say anything disrespectful or ugly [fol. 800] to me,—

Q. Did they try—

A. —but they were just there.

Q. When you sought to pass them, did it require any effort to go by?

A. Well, I just went right on in.

Q. I see.

A. I didn't wait to see whether anyone was going to try to keep me out or not. I just—one of my friends said, You can't go in. I said, I can go in.

Q. Don't tell the conversation. Did you before seeing—finally elbow your way through—to use elbows and what have you to wiggle your way through the crowd?

A. Yes, I just wiggled my way in.

Q. Did you make a request to them for you to do that?

A. No. I did not say a word to anyone. I did not say a word. I just sort of wiggled my way in the crowd.

Q. Did the other ladies follow you?

A. Yes, they did.

Q. Now, having made your way into the restaurant proper, what did these defendants do with respect to gaining admittance?

Mr. Looby: I am objecting to this question, if your Honor please. She has not identified these defendants. She [fol. 801] said she saw some colored men there. That's all she said.

A. Well, they were all in the entrance.

Mr. Looby: Well, I am objecting to Counsel referring to these as defendants.

Mr. Williams: We object to his leading also.

The Court: I think he has done a pretty good job of not leading the witness, but he does object to you referring to these as defendants when she hasn't identified them as such.

Mr. Maddin: All right. Eliminate the word defendants in my question, Mrs. Edwards. And supply the Negro men who were in the entrance way there. What, if anything, did they do toward seeking admittance after you entered?

A. Well, they came—they just closed right in behind us in front of the second door, like they were going to block other people out. That's what I took it to be.

Mr. Williams: If your Honor please, we object to what she took it to be. She said that's what she took it to be.

The Court: Yes. I understand that. But I think the jury will understand. Those are just expressions. You mustn't give conclusions. Just what you saw happen, there.

A. Well, I saw that.

The Court: Well, go ahead Mr. Maddin.

Mr. Maddin: Did any of them pass through the door?

A. Into the cafeteria?

Q. Or any portion of it?

[fol. 802] A. No. Not that I saw.

Q. And I presume that you went ahead into the restaurant and got your meal?

A. That's right.

Q. Did you find a table?

A. Yes, we did.

Q. Where?

A. Up at the front—the very front where we could see everything that went on.

Q. And did you see anything going on at the time you were seating yourself at the table?

A. Yes. Yes.

Q. When did, in relation—well, let me ask you this—did the police officers arrive?

A. Yes, they did.

Q. When did they arrive in relation to the time you seated yourself at the table?

A. Oh, I'd say about 15 minutes, maybe 20 minutes.

Q. And having arrived, what did they do?

A. Well, I presume they arrested these men. They took them out.

Q. They took them out?

A. Yes, sir. They first talked—I'll say that. They first talked around, just a few minutes, and then they took them [fol. 803] out.

Q. Do you know if they took all the persons, all the Negro persons who were in that vestibule out and away?

A. Yes, in fact, there was no more disturbance. Other people came in there.

Q. And there were none left when the police left?
A. So far as I could see.
Q. None left before the police arrived?
A. No.
Q. Before they got there?
A. Not that I heard.
Q. Did you notice them taking away—where the police took them?
A. No. I just knew they came in the patrol wagon,—the police wagon.
Q. Was it right where you could see it there?
A. Oh, yes, because they seated us at the front. There was quite a big crowd.
Q. I bet. Did you see them go into the patrol wagon?
A. Yes, I saw them.
Q. All of them in the vestibule?
[fol. 804] Mr. Williams: If your Honor please, we object to the leading.
A. In fact I know they were all there—there looked to be about 7 or 8.
Q. Yes, ma'am.
A. I didn't count them.
Q. You may cross examine.

Cross examination.

By Mr. Looby:

Q. Mrs. Edwards, I believe you said there were two ladies who left the church with you?
A. That's right.
Q. All three of you went in?
A. I beg your pardon?
Q. All three of you went in?
A. Yes.
Q. In the cafeteria?
A. Yes.
Q. And all three of you were served?
A. Yes.
Q. Did the doorman open the door to let you in?
A. Yes, the doorman was there,—

Q. And he opened the door and let you in?

A. And he let us in when—after I had gotten through [fol. 805] the crowd, he let us in the door.

Q. And all three of you got in?

A. I beg your pardon?

Q. And all three of you got in?

A. Yes.

Q. And all three of you were served?

A. Yes.

Q. Now, the number of white people—there were a number of white people at the door, weren't there?

A. Yes, there were a number of white people even on the outside. Do you mean the outside?

Q. You had to elbow your way through there, didn't you?

A. Sir?

Q. You had to elbow your way through there, didn't you?

A. Yes, I did. I certainly did. I had to sort of just push my way through.

Q. That was through the crowd of the white people?

A. No. Not the white people. Through these colored people who were inside. You see the white people were outside on the sidewalk.

Q. Well, now—

A. These colored boys all in the entrance. They were [fol. 806] right in the entrance. And we went in the first doors. You see there are double doors there. We got through the first doors,—

Q. Well, just before you got to that first door, did you have any difficulty getting through the white people?

A. No, I didn't have any difficulty getting through the white people.

Q. In other words, the sidewalk was clear up to that first door?

A. Well, there were some people walking around out there, but they were not bothering me. They were not obstructing my getting in.

Q. Just walking up and down the street—Sunday afternoon?

A. Well, no, I don't think they were just walking up and down the street. They were waiting to get in to the cafeteria.

Q. And you were not bothered to pass them?

A. We passed right by them and went on in. I don't pay attention to what other people are doing. I just mind my own business.

Q. And that was all you doing?

A. I was just wanting to go in to be served.

[fol. 807] Q. You were minding your own business, and you went right on in?

A. Yes, I walked right on in, and I didn't say anything to anybody.

Q. And everybody that was minding their own business was able to get in and be served, just like you?

A. Well, I don't know about that, but I was served.

Q. And all three of you went back there?

A. Yes.

Q. And were served?

A. Yes.

Q. How many white people were standing outside?

A. I don't estimate crowds. I couldn't tell you that to save my life. There were a good many people even walking down the street—just walking up and down. And one lady said to me, We are waiting to get into the cafeteria.

Q. Well, we don't want to know what anybody said to you.

A. No. You don't want conversation. I know that.

The Court: He didn't ask you what you said. He just asked you how many people were on the outside.

A. I can't estimate a crowd. I couldn't tell you. There [fol. 808] might have been—well, there looked like there might have been at least 25 or 30, outside to get in.

By Mr. Looby:

Q. None of these people were arrested, were they?

A. The white people?

Q. Yes, ma'am?

A. No,—arrested?

Q. The police didn't bother any of them?

A. No. The police couldn't bother any of the white people. He certainly did not.

Q. I see. That's all, Mrs. Edwards.

MRS. LOTTIE MARTIN, called on behalf of the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maddin:

Q. Mrs. Martin, what is your full name, please.
A. Lottie Martin.
Q. Mrs. Martin, you'll have to speak up so everybody can hear you back here.
A. Lottie Martin.
[fol. 809] Q. Mrs. Martin, where are—are you employed?
A. No, sir.
Q. You are a housewife?
A. Yes, sir.
Q. Mrs. Martin, on October 21, 1962, did you seek to obtain lunch at a downtown restaurant?
A. Yes.
Q. What restaurant was that?
A. B & W on 6th Avenue.
Q. With whom did you go to that restaurant?
A. My son and his wife and children and my husband.
Q. And at approximately what hour did you arrive?
A. Well, I presume it was nearly 12:30.
Q. Where had you been?
A. We had been to church.
Q. And when you approached—from what direction did you approach?
A. Well, we were going toward Church Street.
Q. And, in approaching the restaurant, did anything unusual take place?
A. Yes.
[fol. 810] Q. What was that?
A. An extra crowd of people out—more than usual.
Q. And when you got to the B & W Restaurant there, did you observe anything taking place in the vestibule?
A. Yes.
Q. What did you observe?
A. There was a group of colored boys in the vestibule.

Q. And did you seek to—how long did you wait before seeking to go through this group?

A. Well, we didn't wait long. We walked up, and my son is acquainted with the doorman, and he said, Come on in, Mickey,—called my son by his first name, so my son—he's a big man, and he just pushed his way on up there, and got in the door and held the door open, and the rest of us just walked on it.

Q. What, if anything, occurred to you?

A. Well, I—

Q. When you were walking through these Negroes?

A. Well, when I came along, I was about the last one of us, I think, in, of the group. And they was 'sort of closed in, you know, and they said to my son, What do you care whether we—

Mr. Williams: We object, there's—there's—

The Court: If it was some of the defendants talking, of course that's competent.

[fol. 811] Mr. Williams: There's no proof here regarding that.

The Court: Well, if it was one of the defendants it is competent.

Mr. Williams: She hasn't—she said, if your Honor please, they said something, and that don't add one scintilla to tie it in with any defendant here in regard to that.

Mr. Maddin: Do you know which one of these defendants said it?

A. I couldn't pick one certain boy out.

Q. Can you say it was one of them, though?

A. Yes, one of those. One of the boys that were up there that day.

Mr. Williams: Well, we object. That's exactly why we object.

The Court: Well, I'll overrule your objection, gentlemen.

Mr. Williams: Respectfully except.

A. So that him what he cared—why he cared whether those other people got in there, or not, and he said, Well, these people are with me, and I want 'em in here. And so—then I got up there closer—

Mr. Williams: I didn't hear what she said, if your Honor please. Repeat that, please.

A. My son said these people are with me, and I want [fol. 812] them in here, so he said to them that—they sort of closed in—and when I got up there, he said, You all stand aside. This is my mother. And I went on in.

Mr. Maddin: And you had gotten through this crowd?

A. Yes.

Q. He wanted to have you along?

A. Yes, sir.

Q. Where did you seat yourselves, in relation to this disturbance?

A. Upstairs.

Q. You were not in a position upstairs to observe the conduct or action in the vestibule?

A. We couldn't see the vestibule.

Q. Do you know what occurred there in relation to the persons that were blocking the passageway in the vestibule after you left?

A. We could see the sidewalk outside.

Q. What did you see on the sidewalk outside?

A. Well, we saw some policemen. I suppose they escorted the boys off.

The Court: Now, you can't suppose.

Mr. Maddin: Don't say if you don't know.

A. Well, we just saw the policemen come up.

Q. And when you came out, after a period of time, what [fol. 813] happened so far as the passageway was concerned?

A. Well, when we came out, there was no—no one there.

Q. Mrs. Martin, do I correctly understand that you saw your son in an effort to get through into the restaurant?

A. Yes, sir.

Q. You were standing where you could observe what he was doing?

A. Well, he just sort of elbowed his way in. (She moves arms from side to side.)

Q. Was some extent of force necessary? Or are you just moving your arms like so, back and forth sideways in

the witness chair? Were any elements of effort observed by you in trying to gain access?

A. Well, I would say—that's what I would say—that he just used his elbows to sort of push his way in.

Q. Was his effort resisted, or not?

A. I wouldn't say they were.

Q. No one stepped out of his way to block his path?

A. No.

Q. Did you have to use any force?

A. No.

[fol. 814] Q. That was after your son made a passageway for you?

A. Yes, sir.

Q. That's all.

Cross examination.

By Mr. Williams:

Q. Mrs. Martin, you don't know any of the defendants sitting on this trial today?

A. No,—

Mr. Martin: I can't hear, your Honor.

Mr. Williams: You don't know any of the defendants sitting on this trial today?

A. No—I wouldn't—I didn't recognize them.

Q. Mrs. Martin, how large is this vestibule, that you were talking about?

A. Well, I presume it was about the size of this area here.

(Points to area around the witness stand and around the corner of the courtroom.)

Q. Now, Mrs. Martin, in what formation—do you know how many of these colored boys there were?

A. Well, at that time, I didn't count them.

Q. And is your son here today to testify?

A. Not today.

[fol. 815] Q. Is your son any larger than Mr. Carrier?

A. He may be taller.

Q. But not as large in terms of stoutness?

A. Not, well, not quite as stout.

Q. Your son is then tall and slender? Is that it?

A. No, he is a little on the husky side.

Q. Was he a football player?

A. No, sir.

Q. Now, Mrs. Martin, you recall just how these colored boys were standing in the vestibule, what formation?

A. Well, they were just in a bunch.

Q. Were they standing in a line, sort of—waiting to get in the door?

A. No, I wouldn't say it was a line.

Q. Well, is it, or is it not true that the doorman had the door blocked there, preventing them from entering the door of the restaurant proper?

A. Well, the doorman was inside and he—

Q. The doorman was inside, was he not?

A. Yes.

Q. And he had the door blocked, and he let you all in, that's true, isn't it?

[fol. 816] A. Well—I don't know whether he opened the door.

Q. Well, you were observing everything very closely, now, Mrs. Martin, weren't you?

A. (Laughs aloud.) Well, I don't know that I was observing everything.

Q. Well, then, if you were not, then, you do not know exactly how these boys were standing in the vestibule, do you?

A. I know they were standing in a group.

Q. Yes?

A. They were all there together.

Q. They were all there together? Well, now, were they together like they are seated here now, or—

A. No.

Q. Or—

A. They were—it looked to me like they were trying to block the door.

Q. Well, I didn't—I don't want you to say what it looked to you like, ma'am,—if you will tell—if you will tell me exactly where they were standing, how many of them there were, and where they were standing with reference to the

door. Please, ma'am, if you remember, I want you to tell what you know, not what you want to testify.

Mr. Maddin: Well, we object to that if the Court please.

Mr. Williams: Well, if you please ma'am, just tell ex-
[fol. 817] actly what you saw, that's what I want you to do. Where did you see them standing? And how many were there?

A. Well, I don't know how many there were,—

Q. You don't know how many—

A. There was a group of them.

Q. Ma'am?

A. There was a group of them.

Q. You don't have any idea how many there were?

A. Well, yes, I have an idea—

Q. Well—

A. —because there's 8 of them here today.

Q. I see. So you would say now, because you see 8 here today, that there were 8 in that group?

A. Yes.

Q. And for that same reason, you would also like to say that the 8 were blocking the door?

A. Not that many—

Mr. Maddin: If your Honor please, we object to counsel trying to suggest to this witness that is going to come up here and say something and on the contrary you had better be silent.

The Court: No. He's examining here.

Mr. Williams: You don't threaten me! It would have no
[fol. 818] effect if you did!

The Court: All right now. Let's—let's—let's proceed orderly.

Mr. Williams: Now, Mrs. Martin, in what way were they blocking the door?

A. Well, they were standing so close to the door that unless you pushed through them, you couldn't get in.

Q. What—do you know of anybody who tried to get in there, and couldn't?

A. Well, there's several people were walking away from there when we came up.

Q. I am asking you, Mrs. Martin, if—you were coming from church that day?

A. Yes, sir.

Q. Now, I asked you if you saw anybody who tried to get in that door, and couldn't, other than those colored boys that you saw there?

A. No.

Q. That's all.

The Court: Gentlemen, I think we are close to the adjourning time for today. That will be all the witnesses we will hear today. Members of the jury, let me admonish you, do not discuss this case at all among yourselves, and at any time until the final charge of the court has been delivered and you have been permitted to deliberate. Do not discuss [fol. 819] the case. Now, what officers have the jury—have been sworn to the jury?

(Suggestion is made to the Court to admonish the witnesses to be present the next day.)

The Court: Yes, I will do that, in a few minutes.

(Officers who have been sworn to the jury step forward.)

The Court: You will take the jury upstairs. They will eat at 6:00 o'clock if that suits them. I am sure there are some jurors who have been accepted today who shall possibly want to make some calls to their homes. And keep the jury together, if there are any calls to be made.

All right.

(Thereupon the trial was adjourned for the day at 4:30 p.m.)

4th Day

March 8, 1963

The Court: (when court assembles) Gentlemen, as I announced a little bit earlier, all matters set for today will be continued one week.

Mr. Looby: While we are sitting here and before we begin, I want to call to your attention the fact that part of this is missing—the 8 warrants, which have been heretofore made a part of the record and don't see them now.

Mr. Nichol: We have them. They will be introduced as part of the proof in a few minutes. We got them out to present our proof.

Mr. Looby: Now, if your Honor please,—is your Honor [fol. 820] ready to proceed, now?

The Court: We were short a defendant. We are ready now that all the defendants are here.

Mr. Looby: I would like to recall Mr. Carrier for further Cross Examination.

The Court: All right, gentlemen, bring down the jury. Do you have any reply? (this to Mr. Maddin)

Mr. Maddin: Yes, we do. We object to Mr. Carrier being recalled, to the witness stand, for further Cross Examination unless Counsel will state the reason that he didn't cross examine him fully while he was on the witness stand. We object to it.

The Court: No. I will permit his recall. Overrule your objection, sir.

Now, are we ready, gentlemen?

Mr. Looby: We are ready, if your Honor please.

The Court: Is the state ready?

Mr. Looby: Subject to recall.

The Court: Well, they say they are going to offer him, and if you want him, you can call him.

We are ready for the jury to be brought down. Bring down the jury.

Mr. Maddin: May it please your Honor, I know the court has the right to exercise its discretion, but I believe that the provision is that on good cause shown that the witness may be allowed to be recalled, and no cause has been related to your Honor.

[fol. 821] The Court: Well, I find no fault in letting him cross examine him further.

Mr. Maddin: There is no fault,—an opportunity to hear other witnesses testify, and what have you, we are here to put our witnesses on in certain order of appearance. Counsel chooses to withhold facts of the examination, it also weights the testimony of other witnesses,—now, if the Court please, I would appreciate it if the Court exercises his discretion if he asks it there, and I know at the same time that the Court tries to be fair to everybody, and in

view of the fact that a cause is what usually requests the Court's exercising that discretion, we ask the Court to call upon Counsel to state a reason.

The Court: Tell us why, then,—

Mr. Looby: One good reason that parts of the record on which I am going to examine him were not available then. The state had those records. I am going to cross examine him on them. We couldn't find those records. We were looking for the records and the clerk didn't know where they were.

Mr. Maddin: The records are right here. Mr. Carrier hasn't got them.

The Court: Well, let him have those records then, and examine him on them.

Mr. Maddin: Which ones does he want?

The Court: He wants those warrants, he said.

Mr. Nichol: (Unfastens some of the records from where [fol. 822] they were attached to other records.) If your Honor please, we had them to go with other papers.

(The jury comes in at 9:12 o'clock A.M.)

(Mr. Nichol hands the warrants to Mr. Norman, Court Officer, who gives them to Mr. Looby.)

(Mr. Looby examined them.)

The Court: While he is looking at them, poll the jury.

(The clerk's polling of the jury is done.)

Clerk: All present, your Honor.

The Court: Gentlemen, are you ready to proceed?

Mr. Looby: As soon as I can examine these warrants, if your Honor please. (He looks over the warrants.) I am ready, your Honor.

The Court: All right. Then you want to proceed?

Mr. Looby: I want to recall Mr. Carrier.

Mr. Maddin: Objection, if the Court please, on failure to state any cause and show the Court grounds to exercise its discretion.

The Court: I will permit the defense to recall Mr. Carrier for further cross examination.

Mr. Looby: Let the record show that the objection was made by Mr. Maddin representing the B & W Cafeteria.

WOODROW WILSON CARRIER, recalled for further cross ex-
[fol. 823] amination, testifies as follows:

Cross examination.

By Mr. Looby:

Q. Mr. Carrier, I believe you testified yesterday, didn't you?

A. Yes, sir.

Q. Now, what did you say—I don't know whether I heard it or not or fail to remember—what did you say your position is with the B & W Cafeteria?

A. Manager.

Q. Manager?

A. Yes, sir.

Q. Did you swear out these warrants?

A. I beg your pardon.

Q. Did you swear out these warrants against these defendants?

A. No, sir.

Q. You did not swear them out?

A. No, sir.

Q. Do you know how your name appears on the warrants as prosecutor? Do you know how your name happens to be listed on the warrants as the prosecutor?

A. No. I do not.

Q. Now, I believe you say you called the police?

[fol. 824] A. Yes, sir.

Q. And the police came and arrested them?

A. Yes, sir.

Q. So that there were no warrants at the time the police arrested them?

A. No, sir.

Q. And these typewritten warrants were made subsequent to their arrest?

A. I presume, so, sir.

Q. Now, one more question, Mr. Carrier. I believe that the B & W Cafeteria fronts on what side of the street?

A. Sir?

(Reporter repeats the question for him.)

Mr. Maddin: I didn't understand the question.

The Court: On which side of the street does the B & W Cafeteria front?

A. Well, let's see, it fronts on the east side of the street, I imagine.

Mr. Looby: On the east side of the street?

A. Yes, sir.

Q. On the east side of 6th Avenue?

A. Yes, sir.

Q. Now, what's on the west side of the cafeteria?

[fol. 825] A. Across the street, sir?

Q. The west side of the cafeteria?

A. The Sam Small Jewelry Store, I guess.

Q. There is a back door to the cafeteria, isn't it?

A. On Harvey's Alley, yes.

Q. And people do come in there, then?

A. Yes, sir.

Q. So there is not only a front entrance, there is also a back entrance to the cafeteria?

A. Yes, sir.

Q. The defendants to whom you refer, or the parties to whom you refer, they didn't come to the back entrance, did they?

A. No, sir.

Q. All right. That's all.

Redirect examination.

By Mr. Maddin:

Q. Mr. Carrier, can you estimate the percentage of your traffic that uses the back entrance to your cafeteria?

A. It would be only a guess, sir, and I would say a small percentage relatively to the total patronage.

Q. Is it general knowledge of the back entrance to your patrons?

Mr. Looby: I object to whether it is general knowledge, [fol. 826] or not, if your Honor please.

The Court: If he thinks he knows the answer to that. I think it would be—

Do you think you know, generally, whether your patrons know about the back entrance, or not?

A. A great lot of patrons do know of the entrance on the alleyway, and use it.

Mr. Maddin: More of them have become acquainted with it, since these sit-ins started, haven't they?

Mr. Looby: Now, if your Honor please, I object to him leading.

The Court: I sustain the objection.

Mr. Maddin: That's all. Come down.

The Court: Come down, Mr. Carrier.

The Court: The state will call its next witness.

Sgt. Thomas R. Beehan, called as a witness for the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Now, state your full name, please, sir.

A. Thomas R. Beehan.

Q. What is your occupation?

[fol. 827] A. Sgt. in the Police Department.

Q. What division in the police department?

A. Patrol division.

Q. Nashville City Police Department?

A. Yes, sir.

Q. All right, sir. Were you about your duties as a police sergeant in the patrol division on October 21, 1962?

A. Yes, sir.

Q. All right, sir. State whether or not you had an occasion to go to the B & W Restaurant?

A. Yes, sir.

Q. Where—where is that located?

A. 6th Avenue, between Union and Church.

Q. In Davidson County, Tennessee?

A. Yes, sir.

Q. All right. What time of the day or night did you get a call to go to the B & W Cafeteria?

A. Around 12:20 p.m.

Q. Yes, sir. You remember what day of the week this was on?

A. Sunday.

Q. Sunday? All right, sir. Now, how did you come to know to go to the B & W Cafeteria? What—where did you receive your information?

[fol. 828] A. Over the radio, Car 1, call for Superior Officer.

Q. I see. And you responded to this call, being the superior officer on duty?

A. Yes, sir.

Q. Now, when you got to the B & W Restaurant on 6th Avenue, who did you see there?

A. Well, I left Officer Moran out front.

Q. All right, sir. Now, was he assigned to Car 1 on that particular day?

A. Yes, sir.

Q. All right. And was there an officer along with Mr. Moran, or not?

A. He was inside the building.

Q. The other officer was inside the B & W Restaurant?

A. Yes, sir.

Q. All right. Now, did you have the occasion to see what was going on there?

A. Yes, sir.

Q. What was it?

A. A lot of people out front—I would say 75 to 100 people out front.

Q. All right, sir.

A. Officer Moran came up and said,—

[fol. 829] Q. Now, you can't tell what Officer Moran said. Did Officer Moran direct your attention to the incident of the B & W?

A. Yes, sir.

Q. All right. Did you go over there?

A. Yes, sir.

Q. What did you see? What was the situation that prevailed there, at the accident?

A. A bunch of colored people inside the vestibule.

Q. Were they within the confines of the vestibule?

A. Yes, sir.

Q. Now, approximately how many were in the group in the vestibule?

A. 8.

Q. 8? All right. Now, did you discuss—have any conversation with the group of 8 that was in the vestibule?

A. Not at the time I arrived, no, sir.

Q. Sir?

A. Not at the time, no, sir.

Q. While you were there, did you have any conversation with them?

A. Yes, sir.

Q. Well, what did you say to them?

[fol. 830] A. Well, after I talked to the manager of the B & W—

Q. Sir?

A. After I talked to the manager of the B & W—

Q. Well, did you talk to the manager in the presence of these defendants?

A. No, sir. The door was in between us.

Q. The door was between you? All right.

A. Yes, sir.

Q. What conversation did you have with the defendants—the 8 that were in the vestibule?

A. After I talked to the manager, I came to talk to them, and told them that—

Mr. Looby: If your Honor please, I object to that. He hasn't identified these defendants.

The Court: Sir?

Mr. Looby: He hasn't identified these defendants.

The Court: Well, I'm going to—

Mr. Robinson: I believe, if your Honor please, that is competent. He has identified the group of 8. And he was the man who went there to see what was happening, and had a conversation with them.

The Court: The only thing I want him to do, Gen. Robinson, is to identify the people here as defendants.

[fol. 831] Mr. Robinson: You did see these people in the vestibule, did you not?

A. Yes, sir.

Q. Are these the defendants that you saw?

A. Yes, sir.

Q. Now, what conversation did you have with these 8 defendants?

A. After I talked to the manager, I came out in this vestibule, and or entrance, whatever you want to call it, and I kept—I give them the opportunity—I told them that the manager wanted them arrested if they did not leave. And I asked if they wanted to leave. They did not answer when I asked them. I asked them if they wanted to leave. And the one over there with his hand on his face—

Q. The man with his hand on his face—what did he have to say about it?

A. I asked him if he wanted to leave, and he shook his head.

Q. Sir?

A. He shook his head.

Q. Indicating what?

A. That he did not want to leave.

Q. Meaning "no" that he did not want to leave?

A. Yes, sir.

[fol. 832] Mr. Looby: If your Honor please, I don't mind Mr. Robinson testifying, but not under the guise of an officer. That is self-service declaration.

The Court: Well—

Mr. Robinson: Now, if your Honor please, let me just restate it again.

The Court: Don't lead him.

Mr. Robinson: Indicate from the witness stand what this defendant's answer was then you asked him did he want to leave.

A. He shook his head "no."

Q. Well, now, show us just exactly what he did?

A. Shook his head. (Indicates what was done.)

Q. All right. What did you do when the indication was that they were not going to leave the vestibule?

A. I told them, when they wasn't going to leave, that they were under arrest.

Q. Sir?

A. I told them, when they wasn't going to leave, that they were under arrest.

Q. Did you place them under arrest?

A. Yes.

Q. Now, what means did you use to get these people down [fol. 833] to the police station—these people in the vestibule?

A. Called the wagon.

Q. All right. Did the wagon appear?

A. Yes, sir.

Q. All right, sir. What did you do? Where were the defendants when the wagon appeared?

A. Still in the vestibule, at the B & W Cafeteria.

Q. All right. Now, after it got there, what did you do?

A. Told the officer to take them out to the wagon, and of course the man on the wagon come and helped, too.

Q. All right. Now, did you take all of the 8 people that were in that vestibule to the wagon?

A. Yes, sir.

Q. No mistake about that?

A. No, sir.

Q. All right. Did you assist in taking them to the wagon?

A. Well, I took—it is my job to see that they do it.

Q. And did they do it?

A. Yes, sir.

Q. What happened when they got in the wagon?

[fol. 834] A. Well, when they got out there, took them on down to the police station.

Q. All right. To the Nashville City Police Station?

A. Yes, sir.

Q. May it please the Court, the fact that this witness has identified this defendant with his hand on his face, if your Honor please, I would like to know his name for the benefit of the record. To know what his name is. He has been pointed out as having a conversation with this officer, on the 21st day of October, at the B & W, and I think it would be fair, now, to know his name. We don't know his name at all.

The Court: Call on them, and see if they want to give you his name, or not.

Mr. Robinson: What is your name? (To the colored boy.)

Mr. Looby: Wait a minute. You are not examining the defendants.

Mr. Robinson: Well—

Mr. Looby: The only thing the witness pointed to a man with his hand on his face.

Mr. Robinson: May it please your Honor, I want to make it a part of the record.

Mr. Looby: The only thing that needs to go in the record is that he pointed to someone with his hand on his face.

[fol. 835] The Court: Yeah, but he pointed to that third man, now, gentlemen, and—

Mr. Looby: That's all that the record shows.

The Court: Now, you are refusing to identify him?

Mr. Looby: Yes, sir.

The Court: Let the record show, Mrs. Cummins, that the defendant who had his hand to his face was the 3rd, beginning on the right—to my right—1, 2, 3—the third man at the table beginning at my right, and we will refer to him as defendant #3.

Mr. Robinson: Sgt. Beehan, state whether or not you took a list of names while you were up there, or do you have a list of names of these defendants?

A. Yes, sir, I have a list.

Q. Will you read that list of names?

A. Leslie G. McKinnie, the address—you want me to give the address?

Q. Yes, sir, that you took down.

A. 920 28th Avenue, North. 22 years old, John Jackson—

Mr. Looby: Just a minute. I would like for the record to show that he took a paper from his pocket and is reading from that paper.

The Court: That's right.

[fol. 836] Mr. Robinson: You made that paper out?

A. Sir?

Q. You made that paper out, didn't you?

A. I did, yes, sir.

Q. No one else, sir? If you did, go ahead and read it.

A. (Reads.) John Jaekson, 104 29th Ave., North. 18. Allen Cason, 2003 Albion Street. Age 20. Frederick Leonard, 920 28th Ave., North, Age 20. John R. Lewis, P. O. 320 Fisk University, age 20. Frederick Hargraves, 920 28th Ave. North, age 20. Harrison Dean, 920 28th Ave., North, age 19. Nathal Winter, 721 29th Ave., North, age 24. That's all of the defendants.

Q. All right. Now, Mr. Beehan, with reference to #3, is he one of the defendants whose names you just read?

A. I don't know his name.

Q. Is he one of the defendants you have just read?

A. Yes, sir.

Q. All right. Did you have occasion to come to the police station along with that patrol wagon?

A. Yes, sir. I came in my car.

Q. Were you actually at the police station when this patrol wagon arrived?

[fol. 837] A. Sir?

Q. Were you actually at the police station when the patrol wagon arrived from the B & W, with these defendants in it?

A. It came in another way to the police station.

Q. I see. But you go over there and unload them and come up on the elevator?

A. I was present when they booked them.

Q. All right. Who—who was—who came into the booking room?

A. These defendants.

Q. The same 8?

A. Yes, sir.

Q. That you saw at B & W?

A. Yes, sir.

Q. All right.

Cross examination.

By Mr. Looby:

Q. Sgt., I didn't get your name. What's your name?

The Court: The witness' name?

Reporter: Beehan.

The Court: Sgt. Beehan. B-e-e-h-a-n, I think.

[fol. 838] Mr. Looby:

Q. What are the initials?

The Court: He wanted to know your initials.

A. T. R.

Mr. Looby: Now, Sgt., if these defendants went back there in the back (he points then to the back of the court-room where several colored people are listening to the trial), could you pick them out?

A. Your Honor, get him to repeat the question.

The Court: He didn't understand you.

A. You'll have to repeat it. I didn't understand.

Q. If these defendants were to get back here (points to rear of room) and mix up with all these colored folks back there, would you be able to pick these out?

A. Well, I would doubt it. I don't know.

Q. You couldn't pick them out?

A. I don't know about that.

Q. And the only reason that you can identify them today is because they are sitting here at the table?

A. All of the faces are familiar from what I saw.

Q. So they could get out in the hall, and mix up with these colored people, and you wouldn't—you couldn't pick them out, could you?

A. I wouldn't say.

[fol. 839] Q. Sir?

A. I wouldn't say I could.

Q. And so the only means of identifying them is because they are sitting here at this table?

A. I would say that I have seen them up at the B & W, not because they are sitting there.

Q. And are you sure you would know that bunch? And you say you saw them at the B & W.

The Court: He said he would say he saw them at the B & W.

Mr. Looby: And if they got out in the hall, and mixed up with the colored people, could you pick them out?

A. I could pick out the majority of them. I wouldn't say I could pick out the 8.

Q. You never saw them before that day?

A. I don't believe I have.

Q. And you haven't seen them since that time?

A. I saw them coming in the courtroom.

Q. But if you didn't see them coming in the courtroom, and didn't see them coming to this table, then you couldn't pick them out?

A. Repeat, please.

Q. If you didn't see them come in the courtroom and didn't see them come to this table, you could not have [fol. 840] picked them out? Could you?

A. I don't know if I'd say that I couldn't, no, sir. I wouldn't say I couldn't.

Q. You don't say you could, and you don't say you couldn't?

A. No, sir.

Q. Now, you say they called you, and you went to the B & W?

A. Yes, sir.

Q. About how many white people would you say you found there in front?

A. Sir?

Q. About how many white people did you find there in front of the place?

A. Inside or outside?

Q. Outside?

A. 75 at least, outside.

Q. And, of course, you didn't arrest any of them?

A. No, sir.

Q. Now, you didn't tell any of them to leave, did you?

A. Any of the white people?

Q. Yes?

A. No, sir.

Q. Why did you tell the colored people to leave?

[fol. 841] A. Because they was blocking the entrance to the vestibule. The white people couldn't get in.

Q. Did you see any white people that couldn't get in?

A. Well, I might answer it this way.

Q. I didn't ask you that. Did you see any white people that tried to get in and couldn't get in?

A. They wasn't pushing their way in, no.

Q. Sir?

A. They wasn't pushing their way in, no.

Q. Nobody was pushing. No white people tried to get in?

A. They weren't pushing their way in, no, sir.

Q. Well, did you see any white people trying to get in and couldn't get in?

A. I don't know whether they was tryin' to get in, or not.

Q. You didn't have a warrant when you arrested them? Those colored men?

A. No, sir, not at the time, no.

The Court: A little bit louder, Sgt.—a little bit—

A. No, sir, I didn't have a warrant.

[fol. 842] Mr. Looby: When you got there, you say the manager spoke to you?

A. Repeat it, please, sir.

Q. Did you say that the manager spoke to you after you got there?

A. I went to see the manager after I got there, yes, sir.

Q. And it was after you saw the manager and it was under the manager's instruction that you arrested them?

A. I would say that he told me that if they did not leave, that he wanted them arrested.

Q. Yes, sir? And you followed his instructions?

A. Sir?

Q. And you followed his instructions?

A. Not followed his instructions. I asked them if they wanted to leave.

Q. Well, that's what the manager told you to do?

A. He didn't tell me—

Q. Well, he told you—

A. He wanted them arrested, he didn't tell me—

Q. He told you that if they didn't leave, he wanted them arrested?

A. Yes, sir.

[fol. 843] Q. The manager said that?

A. I give 'em an opportunity to leave.

Q. And in doing so, you simply followed the instructions given you by the manager?

A. I didn't take instructions from him. He said he would prosecute if they didn't leave.

Q. If the manager didn't ask you, you would not have arrested them?

A. No, sir.

Q. So that you were following instructions of the manager?

A. I don't think so.

Q. You didn't arrest any of the white people?

A. No, sir.

Q. Do you know those colored men you saw there were seeking service at the cafeteria?

A. No, sir.

Q. You didn't know that?

A. No, sir.

Q. But, if you knew they were seeking service at the restaurant, would you have arrested them?

A. I would not have arrested them if I didn't have a prosecutor.

Q. Sir?

[fol. 844] A. I would not have arrested them if I didn't have a prosecutor.

Q. And you arrested them because you had a prosecutor?

A. Yes.

Q. And the prosecutor was the manager?

A. Sir?

Q. And the prosecutor was the manager?

A. He told me he was, yes, sir.

Q. At the time that you arrested them, why was it, Sgt.?

A. Because they was violating the law.

Q. What law?

A. I can't read it offhand.

Q. Sir?

A. I can't read it off.

Q. You can't read it off?

A. No, sir. I don't have it in my mind, no, sir.

Q. Did you have it in your mind that Sunday?

A. Sir?

Q. Did you have it in your mind that Sunday when you arrested them?

A. When I arrested them?

[fol. 845] Q. Yes, sir?

A. I brought them to the station.

Q. I didn't ask you what you did. I asked you—you say you don't have the law in mind now. I asked you if you had the law in your mind when you arrested them on Sunday, October 21, 1962?

A. I had in mind what I was going to charge them with when I arrested them.

Q. Repeat that, please.

A. I said I had in mind, that if I was going to have to arrest them, what I would charge them with.

Q. Did you go in the restaurant?

A. Sir?

Q. Where did you talk to the manager of the restaurant?

A. When I arrived there.

Q. Where?

A. Sir?

The Court: Where? Where?

A. At the B & W Cafe.

Mr. Looby: On the outside. or the inside?

A. Inside.

Q. So you had no trouble getting in?

A. Well, I kinda pushed my way in. The door was blocked when I went in.

Q. Was it blocked when you went in and when you came [fol. 846] out?

A. Sir?

Q. Was it blocked when you went in and came out? There were people going in and coming out?

A. Not when I arrived there, no, sir.

Q. There were none going in or coming out?

A. Not when I arrived, no, sir.

Q. Did you ask them to let you in?

A. Did I ask them? No, sir, I just walked in.

Q. You didn't ask them if they would let you in. Just pushed on in?

A. I didn't push my way. I asked them to move out of the way while I was getting through.

Q. What did you ask them?

A. After I kind of brushed them aside—I didn't push them, I just—

Q. Well, now, Sgt. do you understand what I am asking?

A. I hope I do.

Q. Did you ask them to let you in?

A. No, sir.

Q. You went on and pushed yourself right in?

A. No, sir, I didn't push myself. I just excused myself.

[fol. 847] Q. What do you mean when you excused yourself and didn't ask them to let you in?

A. Sir?

Q. What do you mean when you say you excused yourself and didn't ask them to let you in?

A. Well, if you was in my way of an entrance, I would kind of say "excuse me."

Q. And that is what you said to them, was it?

A. Yes, sir.

Q. And they let you be excused?

Q. Yes.

Q. Even I don't know why you tell us you had to push your way in. And you say you asked them to excuse you.

A. Repeat that. I can't understand.

Q. Well, anyhow, did they excuse you?

A. (Hesitates.)

Q. Did they excuse you? And you did get inside and you went and talked to the manager and he asked you to arrest them if they didn't leave?

A. Yes.

Q. And you asked them to leave, and they didn't, and you arrested them?

A. Yes.

[fol. 848] Q. So you only made an arrest on the instructions of the manager?

A. No, sir. I—they violated the law. I have to have a prosecutor before I could arrest them.

Q. What law did they violate, sir?

A. Well, I couldn't call the law.

Q. Well, if you say that they violated the law, can't you tell them what law they violated?

A. No, sir.

Q. How long have you been on the police force?

A. I have been here 22 years. If I knew all the laws—

Q. 22 years?

A. Yes.

Q. And you have been promoted to the rank of Sgt., and you say you don't know about the law, and you said here today you didn't know what law they violated. That's all, sir.

Mr. Robinson: May it please your Honor, I want to object to that.

The Court: Well—

Mr. Robinson: He is not charged with knowing what the law is at all.

The Court: That's all.

[fol. 849] Mr. Robinson: He couldn't tell what they did.

Mr. Looby: He should know what they are arrested for.

The Court: That's all. He can come down.

Owen Smith, being first duly sworn, and so called as a witness on behalf of the state, testified as follows:

Direct examination.

By Mr. Butler:

Q. Please state your name.
A. Owen Smith.
Q. What are your duties?
A. Booking clerk.
Q. For what?
A. City Police Department.
Q. For how long?
A. 9 or 10 years.
Q. Mr. Smith, I show you here 8 warrants—

The Court: (Points to Mr. Looby.)

Mr. Looby: I would like to see those, please. Those secret documents ought to be inspected by us.

(Mr. Butler shows them to Mr. Looby.)

Mr. Looby: If your Honor please, these have been in-[fol. 850] geniously put together, for reasons that will be obvious to the Court and part of the bonds made in the City Court, another part is the warrant issued by the City Court, and another is the combination of arrests, and I am

objecting to that being introduced—at least a part of it.

The Court: What is your objection?

Mr. Looby: If your Honor please, this is introducing something in the record that is not proper. After your Honor reads them, you will see why.

You will have to look at them to appreciate my objection.

(Officers hand them to the Court)

Mr. Looby: That third one is the one I am objecting to.

The Court: Sir?

Mr. Looby: That third one—third piece of paper on it. The—I think, the last one.

(The Court examined the records handed to him.)

The Court: Well, there are 5.

Mr. Looby: Let me see that, please, sir. I can show you what I want. (He examines them again.)

These two last ones.

The Court: (Takes the papers then returns the papers.) One is a copy of the other.

Mr. Nichol: A copy of the other. A duplicate record. [fol. 851] One for the record and one for the original file.

The Court: Well, I was going to say,—oh, yeah, they are the same thing. Now,—what objection do you find to that being offered?

Mr. Looby: There should be one in each of them.

The Court: What objection do you find for that being offered in the record? This is a copy of it.

Mr. Looby: (Looks at papers.)

If the Court please, there some funny numbers and some funny marks here, and I don't know what they mean. I would like to have them explained in the absence of the jury, so that—the jury could be excused for a minute or two.

The Court: Let the jury be excused.

(The jury retires at 9:52 a.m.)

Mr. Looby: What I want to know, in the absence of the jury, is that there are some funny marks on them that I would like to have explained. If they refer to any previous arrests, they are not to be allowed, and if they refer to these arrests, they are permissible.

The Court: Ask the witness if there is anything on there that refers to any former arrests? I can't—

Mr. Looby: What are these marks? These pencil marks, etc.

A. Let's see what you are talking about.

The Court: Not on this one. Give him one that is.

[fol. 852] A. These marks and numbers?

Mr. Looby: Yes.

A. That's the processing in the record room of a card that's made on this red sheet.

Q. Then it has nothing to do with any previous arrests?

A. No, sir.

The Court: You are not going to say anything about previous arrests? You can't do that.

A. No, sir, I said none of these marks indicate that.

The Court: Don't mention that. I am sure you gentlemen are not going to ask that.

Mr. Butler: I think there is no intention of that.

The Court: All right. I think we can bring the jury back. Let's see, gentlemen, if we have them straight. Have we separated any of them? I had better let you straighten them out, Gen.

Mr. Butler: That is one reason we took this time this morning to get all this together so we wouldn't delay the Court, but I don't know whether they are back together now, or not.

The Court: I don't think we mixed up more than the first one, maybe.

[fol. 853] Mr. Butler: All right, sir.

The Court: Bring the jury back down.

(The jury returns to the courtroom at 9:54 o'clock a.m.)

The Court: All right, Gen. Butler.

Mr. Butler: Mr. Smith, as general clerk, or booking sergeant, what are specifically your duties in that capacity?

A. Typing up those arrest sheets that you have there.

Q. All right, now, sir, will you try for the benefit of the Court and the jury, to explain what the mechanics are when a person is arrested and brought to the police station?

A. Well, when they come in off the elevator they are brought one at a time to the booking counter. And those questions that are outlined there on that red sheet are filled in.

Mr. Butler: Let's take them one at a time. I showed you 8 a while ago. Are you familiar with these 8 records that I showed you?

The Court: Now, General, are you going to make those exhibits?

Mr. Butler: Yes, sir.

The Court: If so, let's get them in the record. Well, do you want to make them as collective exhibits? Have you got them together?

[fol. 854] Gen. Butler: I would like to make them a collective exhibit.

The Court: Then let's mark them as we go along—exhibits I through—as we go along, make each one separate.

Gen. Butler: Very well, your Honor.

The Court: So we can keep the record straight on them.

Gen. Butler: All right. Now, Mr. Smith, first let me ask you what that particular document is?

A. An arrest record.

Q. Speak up so everybody can hear you.

A. Arrest record.

Q. Of who?

A. Of Lester G. McKinnie.

Q. Would you tell the Court and the Jury what information is contained on that document on a person by the name of Lester G. McKinnie?

A. Well, his race, age, address, occupation, physical description, his nearest of kin, place of arrest, and the violation of the law.

Q. All right, sir, and what information is on that record that indicates that you had anything at all to do with it?

A. My initials.

Q. And what is that?

[fol. 855] A. O. S.

Q. And what does that say by your initials?

A. Booked by.

Q. All right. Now, let me see if I understand you. It

shews here the date Sunday, October 21, 1962. That is the date of the arrest, or the date you booked them, or what?

A. The day they were brought in and I booked them.

Q. All right, sir.

Q. (continued) What time?

A. 1 o'clock P.M.

Q. And what does arrest #1150 mean?

A. That is City Court Docket.

Q. All right, sir. Now, you say the name McKinnie, Lester G., sex, male, colored, date of birth, 1/11/40? From whom did you get that information to put on this docket?

A. From that boy right there.

Q. From Lester G. McKinnie? From the person who identified himself as Lester G. McKinnie?

A. Yes, sir.

Q. All right, sir. And the resident's address of 920 28th Avenue, North. Is that his address?

[fol. 856] A. Yes, sir.

Q. That he gave you, sir?

A. Yes.

Q. O.K. And occupation is what?

A. Student.

Q. Where?

A. A & I University.

Q. All right, sir, and what is his height, according to him? And his weight according to him?

A. 5 ft. 10½ in., 165 pounds.

Q. All right. And eyes brown?

A. Yes, sir.

Q. And complexion?

A. Medium.

Q. Scars?

A. None.

Q. And the nearest relative and address?

A. Mamie McKinnie,—mother.

Q. And from whom did you get that information?

A. The same.

Q. And the place of arrest is where?

A. 226 6th Avenue, North.

Q. Do you know what the 226 6th Avenue north, is of your own knowledge?

A. Of my own knowledge? No, sir.

[fol. 857] Q. From whom did you get that information?

A. Same feller that give me that.

Q. All right. And city violation, City Code, chapter what?

A. 2659.

Q. All right, now, section what?

A. 59.

Q. All right, sir. And who does it list as the prosecutor?

A. W. W. Carrier.

Q. And what's his address?

A. 203 Cantrell Avenue.

Q. All right, sir, now, did this person, Lester G. McKinnie, have any personal belongings on him at the time you booked him in?

A. $6, umbrella, and a billfold.

Q. Who was the property received by?

A. B. C. is his initials. I don't recall who it was.

Q. All right, sir. Now, there is a time—a court time. What does it show?

A. 10 A.M. on the 22nd. October 22nd.

Q. Would that have—that would have been the next day—Monday?

A. Yes.

[fol. 858] Q. All right, sir. And you say you made this record?

A. Yes, sir.

Q. All right, sir.

The Court: I show you another record, Mr. Smith, and ask you what that record is, please sir.

The Court: We will make the McKinnie records all collective exhibit #1, since there are a large number of exhibits.

OFFERS IN EVIDENCE

(Papers referring to the record of Lester G. McKinnie, are marked col. ex. #1, Direct Exam., Owen Smith, and filed in evidence.)

Mr. Butler: Now, what is the difference between that record and this record that I have here, Mr. Smith?

A. This is from the record room file which has the processing machinery over there. I believe that is what it is.

The Court: You are not speaking loud enough for the jury to hear you now.

A. It is a duplicate of this, with the exception of the numbers where the information on him is processed on cards in the record room.

Q. All right. And what about the signature?

A. His signature is made on property in getting out.

[fol. 859] Q. There is a signature, Lester G. McKinnie on there. Who put that on there?

A. Well, he would have to write that on.

Q. And why would he have to do that, Mr. Smith?

A. To sign for personal property.

Q. In other words, they are duplicates with the exceptions of these numbers that are put for the processing?

Mr. Looby: If your Honor please. Just a minute. I think that Mr. Butler would be a better witness than the witness on the stand. I object to him testifying.

The Court: He—

Mr. Looby: As I understand him, he said who put the name on that—Lester G. McKinnie, he doesn't ask if he saw the man put it on.

The Court: Well, he doesn't say—he is just saying that that is the custom over there.

Mr. Looby: The custom?

The Court: That's right.

Mr. Looby: Well, I would like for him to say that.

The Court: That is what you are saying, is it not, Mr. [redacted]th, that it is customary that when the defendant gets his property back, for him to sign that record for it?

[fol. 860] A. That's right, when he's really going back to—

The Court: But you did not see the man sign the record?

A. No, sir, not that one. I did not see him sign his name for his property out.

Mr. Looby: That's what I wanted to bring out.

The Court: That's right.

Mr. Butler: Now, who was present, according to this record, and returned Lester G. McKinnie's property to him?

A. Well, the booking sergeant at the time, I don't know how this—of course, this doesn't show on the release, the bond, however he got out, see. It wouldn't be on here. I don't know who that was.

Gen. Butler: Now, according to this record, and according to the procedures that your department uses, since property is taken from a prisoner when he is booked in, that property is returned when they sign for it? Is that correct?

A. That's right.

Q. In other words, this acts as a receipt to the police department from persons arrested where their property is then returned to them? Is that correct? Mr. Smith?

A. Yes, sir.

Q. Now, I show you here another document and ask you what that document is?

[fol. 861] A. That's a city court warrant.

Q. And what is that warrant for, and what defendant's name is on it?

A. It is made out to Lester G. McKinnie.

Q. And read the warrant, if you will, please, sir, to the Court and to the jury.

A. I hereby recommend you to arrest Lester G. McKinnie—

Q. Recommend, or—

A. Commend. I am sorry. And bring him before me to answer at the City of Nashville on a charge of unlawful conspiracy to violate (1) Sec. 39-1101-(7), and Code Sec. 62-711, for unlawfully conspiring to commit acts injurious to public trade or commerce, and obstructing the order of business at the B & W Cafeteria, 226 6th Avenue, North, by congregating in great number, and blocking service of food in said restaurant, preventing the orderly operation of business, said offense being committed on 10/21/62.

Q. All right. Read the balance of it, please, sir.

A. Given under my hand at ..... office, this 21st day of October, 1962.

Andrew J. Doyle, City Judge.

Q. All right, sir. Now, is that a city warrant?

A. Yes, sir.

[fol. 862] Q. All right, sir. Is—let me ask you this: What authority did you have, Mr. Smith, after these people were booked for placing these people in jail?

A. You see our procedure is this: When they are booked, we make out a warrant, booking them, and they either make a cash or signed bond while they are booked.

Q. All right. Was this defendant, Lester G. McKinnie booked and put in jail, or did he make a cash bond at that time?

A. No, sir, he was locked up.

Q. All right, sir. Now, was he locked up on the authority of this warrant that you have just read to the jury, or by some other authority?

A. This warrant.

Q. By the authority of this warrant? Now, I notice on the back of this warrant—the same warrant that you have read to the jury that it is a warrant, City of Nashville vs. Lester G. McKinnie? Is that correct? Please sir?

A. Yes, that's correct.

Q. And what is that stamped across the warrant?

A. Hold for Criminal Court.

Q. And when was that put on there?

A. In City Court.

Q. When?

[fol. 863] A. The next day—the 22nd. This right here was put on there. In other words, this warrant right here—in the court office downstairs—city court.

Q. Yes, sir.

A. This was put on here to keep these warrants separate from the others processed the same day.

Q. Now, what day does it show there?

A. 22nd of October, 1962.

Q. All right, sir. Now, what does that mean: Hold for Criminal Court, Mr. Smith?

A. Hold it. Hold this warrant for to the end of—

Mr. Looby: I don't see how you can interpret it.

Mr. Butler: That's his job.

Mr. Looby: I think that a lot of times—

The Court: I don't know whether he knows about that, but if he is familiar with the custom, he might testify about the custom. I am sure he doesn't know about this individual, but if he knows generally, if he thinks he knows generally what that means down there, generally, he can state that.

Mr. Looby: Now, if your Honor please, you remember we had a motion as to whether or not these cases really were for criminal court?

A. (By the Court): That's right.

Mr. Looby: If your Honor couldn't interpret it, I don't [fol. 864] see how he is going to interpret it.

The Court: He does—I don't know that he can interpret it, but he may relate the procedure that they use in City Court.

Mr. Looby: He wasn't asked that.

The Court: Well, that is what he can relate.

Mr. Looby: That's what they term monstrosity.

The Court: That is what I am saying.

Mr. Butler: All right. What is this 4th white document there, Mr. Smith, that I showed you?

A. It's a bond to the city court.

Q. And when was that bond executed?

A. I will have to look at it, at the time.

Q. All right, if it shows on there. I don't know that it shows on there. If it does, tell us.

A. No, sir, it doesn't. But this was made before the man could be released from the city jail.

Q. All right.

A. Under the reelase, that is.

Q. All right. And what is this yellow document attached to it?

A. This is a state release, required by the City Court on a state charge that has to be made over here and brought over there to go with the city court file.

Q. All right. Now you say made over here? What do you mean by that, Mr. Smith?

[fol. 865] A. Bond has to be made from the criminal court clerk's office.

Q. And what is that piece of yellow paper there? What is it for?

A. In other words, this is a release to us. This yellow slip comes from the criminal court's clerk's office to us. This right here.

Q. All right. In other words, that is a release from criminal court clerk to your department over there that whoever had made this release has made bond to the criminal court, and that is your authority, then, to release a prisoner who has been held in the city jail? Is that correct?

A. Yes, sir.

Q. All right. Now, will you make this document collective exhibit No. 1 to your testimony?

A. Yes, sir.

(This collective exhibit has already been marked at the direction of the Court, as #1.)

The Court: Let the record show how many pieces there are there.

The Attorney Gen.: 5 pieces, your Honor.

The Court: There are 5 documents that constitute Exhibit #1, to Mr. Morgan—

Mr. Looby: Is your Honor going to do the same with the rest of these?

[fol. 866] (It is noted in the record that Ex. #1 has 5 parts.

Gen. Butler: No, sir. I was just going to try to—

Mr. Looby: I thought it would shorten this.

Mr. Butler: I am going to try my best to do so on the balance of them.

Q. Now, I show you here, Mr. Smith, a similar series of documents, with the name on this one of Allen Cason, Jr., and ask you whether or not it is correct?

A. That's correct.

Q. I will ask you to make that collective exhibit #2 to your testimony?

A. Yes, sir.

(Documents of Allen Cason, Jr. are marked as collective ex. #2, to testimony of witness, Owen Smith, Direct Examination, and filed in evidence.)

Q. I will show you here a series of 5 documents bearing the name of Fred Hargraves and ask you whether you find these similar to the other documents?

A. Yes, sir.

Q. Will you make that group collective exhibit #3 to your testimony? Please, sir?

A. Yes, sir.

(5 documents of Frederick Hargraves are marked as collective exhibits #3, to testimony of Owen Smith, Direct Examination, and filed in evidence.)

Q. I show you here one similar series of documents with [fol. 867] the name, Nathal Winter, and ask you if you find these are similar to the other documents?

A. Yes, sir.

Q. Will you file this series as collective ex. #4 to your testimony?

A. Yes, sir.

(Series of documents of Nathal Winter are marked as collective exhibit #4, to testimony of Owen Smith, Direct Examination, and filed in evidence.)

Q. I show you here a series of documents which bear the name of Harrison Dean and ask you if that is similar to the other documents that you have examined?

A. Yes, sir.

Q. Will you make that collective exhibit #5 to your testimony?

A. Yes, sir.

(Series of documents of Harrison Dean are marked as collective exhibit #5, to testimony of Owen Smith, Direct Examination, and filed in evidence.)

Q. I show you here a series of documents of John Jackson, Jr., and ask you if that is similar to these other documents you have identified?

A. Yes, sir.

Q. Will you make that collective exhibit #6 to your testimony?

A. Yes, sir.

(Series of documents of John Jackson, Jr., are marked as collective exhibit #6, to testimony of Owen Smith, Direct Examination, and filed in evidence.)

[fol. 868] Q. I show here to you a series of documents marked to Frederick Leonard, and ask you to examine that, Mr. Smith, and see whether or not that is similar to the others, and if so, will you make that collective exhibit #7 to your testimony?

A. That's correct.

(Series of documents of Frederick Leonard, marked as collective exhibit #7, to testimony of Owen Smith, Direct Examination, and filed in evidence.

Q. I show you one here John Robert Lewis, Jr., and ask you to examine that and see if it is similar to the others, and if so, will you mark that as collective exhibit #8 to your testimony?

A. Yes, sir.

(Series of documents of John Robert Lewis, Jr., marked as collective exhibit #8, to testimony of Owen Smith, Direct Examination, and filed in evidence.)

(Reporter's note: All exhibits are kept in the criminal court clerk's office, and not with court reporter.)

Q. Now, Mr. Smith, you were on duty there that particular day, I believe, from those records, and I believe the time that you read to the jury on the first one was what time?

A. 1 o'clock, I believe.

Q. All right, sir. Now, do you recall this particular group of individuals that was brought in there on that particular Sunday afternoon?

[fol. 869] A. Yes, I remember them coming in.

Q. Who was with them, if you remember?

A. Sgt. Beehan.

Q. All right. And of course you booked all of them?

A. Yes, sir.

Q. How many were there in actual number, Mr. Smith?

A. 8.

Q. Do you recognize any of them now?

A. Uh—

Q. As the ones who were brought in by Sgt. Beehan, and the others with him?

A. I looked and I only recognize the one sitting next to the lawyer there. That one (points).

Q. With his hand in his mouth?

A. Yes, sir.

Q. The one we referred to as—he would be, according to the Judge's count, number 4—defendant No. 4. (He counts down the line.) This would be number 4 here?

A. Yes.

Q. He is the only one you recognize?

A. Yes, sir.

Q. Were they brought in as a group of 8 by Sgt. Beehan's uniformed men?

[fol. 870] A. Brought in by the wagon to the booking room.

Q. Oh, were they brought in in a group of 8?

A. Yes, sir, all together.

Q. They were all there together?

A. Yes, sir.

Q. What happened to them after you booked them, Mr. Smith?

A. Well, they were booked one at a time, and they were carried back and locked up if they didn't make their bonds.

Q. The books would show if they made bond immediately, or not? The records?

A. Yes, sir.

Q. They were all 8 of them there, you personally booked all 8 of them?

A. I think so, yes, sir.

Q. The records would show?

A. Yes, sir.

Q. Were there any other persons in the patrol wagon at that time? If you recall?

A. No, sir.

Q. Brought in from any other source?

A. I don't recall.

[fol. 871] Q. Do you remember who the unit driver or patrol driver was, Mr. Smith? Would your records show that?

A. No, sir.

Q. All right, sir. Now, what time did you happen to go off duty on that particular day?

A. 7 o'clock.

Q. At night?

A. Yes, sir.

Q. If your Honor please, we want to pass these exhibits to the jury, at this time, before our next witness.

The Court: They probably ought to be stapled, unless we pull out part of them.

Gen. Butler: I have paper clips, but I don't have a stapling machine, if I may borrow one from your secretary out there, I will staple them together right now, so they won't get separated from one another.

Mr. Looby: Is it recess time now?

The Court: Beg your pardon?

Mr. Looby: I think Mrs. Cummins is kind of tired.

The Court: Well, you are hurrying me on the recess.

Mr. Looby: I am just looking out for my reporter.

The Court: I don't blame you for that. Are you through with your direct examination? (to Gen. Butler.)

[fol. 872] Gen. Butler: Yes, sir, we will be through with this witness as soon as the jury looks at the exhibits.

Mr. Looby: I haven't worked with him yet.

The Court: Sir?

Mr. Looby: I haven't worked with him yet.

The Court: I know it. She will have an opportunity to rest just a little while they are looking at the exhibits. We are close to recess time.

(The jury looks at the series of exhibits.)

The Court: Well, I don't want you to do all the looking out for this reporter. I want to do part of it myself.

(A short recess is had at 10:20) (10:42 the trial is resumed.)

The Court: Gentlemen, we are working to a 12:00 o'clock luncheon today. And if we don't conclude today, we will have to work tomorrow, Gentlemen.

All right, gentlemen, you may cross examine the witness.

Cross Examination.

By Mr. Looby:

Q. You are Sgt. Owen Smith?

A. No, sir, Sgt. is my father, I am Owen.

Q. Sgt. is your father?

A. Yes, sir.

[fol. 873] Q. Now, you identified these warrants as part of collective exhibit #1? You identified it?

A. I reckon it is #1. I identified the warrants.

Q. Did you have the warrants at the time you booked the defendants or the 8 colored boys?

A. Did what?

Q. Did you have the warrants when you booked them?

A. The warrants were already made out. All I had to do was to fill in the address.

A. Did you have them filled out at the time of their arrest?

A. See this. The address and the date. That was the only thing that wasn't filled out on it. Just this line. The front of it.

Q. I am talking about what part of it was filled out?

A. All of it except this right here. And that—this line right here. And the front and the court date on it.

Q. You mean the stating of the offense was not on it?

A. The offense was already on there.

Q. On the 21st, when you booked them?

[fol. 874] A. Already on the warrant?

Q. Yes, sir.

A. The offense was already on the warrant.

Q. Was it already on there when you booked them on the 21st?

A. Well, I booked them before I made the warrant out.

Q. You booked them before you made the warrant out?

A. That's correct.

Q. So that at the time they were booked, the warrant had not been made out?

A. The warrant wasn't filled out, no, sir.

Q. And when was it signed by the Judge?

A. I don't know. Probably that afternoon, I don't recall whether it was that afternoon, or when it was.

Q. As a matter of fact, Judge Doyle doesn't come to the police station on Sunday, does he?

A. Yes, sir.

Q. Was he there on the 21st?

A. I don't know about that, now, I don't know what time the Judge come in and signed the warrants, but he comes in there on Sunday and signs them.

Q. Isn't it true that those warrants were not signed when [fol. 875] they were booked?

A. That's right.

Q. They were not signed at the time they were booked?

A. That's right.

Q. These warrants were not signed?

A. That's right.

Q. So, you didn't book them on this warrant, then? Did you?

A. Sir?

Q. You didn't book them on this warrant?

A. I booked them, and then filled that warrant out.

Q. I want you to be sure, now. This is of major importance. At the time they were brought in, they were brought in on disorderly conduct, weren't they?

A. No, sir, they was brought in and charged with that law, right there.

Q. Isn't it a matter of fact that they were brought in and charged with disorderly conduct and that the following day —Monday—this warrant was made out and then the charge of disorderly conduct was dismissed?

A. Is that what's on that? All I know is what is on that red slip right there, the charge.

Q. Were they charged with disorderly conduct?

[fol. 876] A. Is that on the red slip you have there?

Q. No, sir.

A. Well, that is what they were charged with, when they came to the booking room.

Q. Are you sure about that?

A. I am positive that I made that red slip out.

Q. And the clerk's office showed that disorderly conduct was dismissed on the following day, Monday, and then the warrant was made out charging this the following day, wasn't it?

A. It would if they were charged with disorderly conduct.

Q. And you say they were not charged with disorderly conduct?

A. Not on that red slip, no.

Q. I am not talking about the red slip. I am talking about what you see here, of your own knowledge.

A. I testified to what I charged them with on that red slip for what I booked them for.

Q. You have no independent memory of what occurred, do you?

A. I don't have a memory of them being charged with disorderly conduct if it is not on that record right there.

[fol. 877] Q. And you only have a memory of what you see on this record?

A. That's right. That's what I recall right there.

Q. And you don't have any memory of booking them for disorderly conduct?

That is all you recall?

A. Yes.

Q. And you don't have a good memory?

A. Yeah, I've got a good memory.

Q. I am talking about this particular incident?

A. Sure.

Q. And you booked them on this?

A. Sure.

Q. And your records show that they were booked on this —so if Mr. DePerri's record down there shows that they were charged with disorderly conduct, and that was dismissed before this warrant was made up, that would be a conflict, wouldn't it?

A. It would be a conflict somewhere, yes.

Q. It would be? Well, now, that is what I am trying to get you from making any conflict.

A. Well, I don't have the other record that they were dismissed, see.

Q. You are testifying to what you did on the 21st?

A. That's right, on that right there.

[fol. 878] Q. Are you testifying on that Sunday—

A. On what?

Q. Are you testifying that on Sunday afternoon when 8 college boys were brought in, on this charge?

A. That's right.

Q. And they were not brought in on a charge of disorderly conduct?

A. No.

Q. If it please your Honor, we would like to have a subpoena for the clerk of the city court, to bring his record as of October 21, 1962.

Clerk: The booking clerk?

Mr. Looby: No, not the booking clerk. We've got the booking clerk here now. Mr. William G. DePerri, clerk of the city court.

Clerk: William G.?

A. Yes.

Clerk: DePerri?

A. Yes. Let me give it to you. You can read better than you can understand me.

(He gives the sheet to the clerk.)

Mr. Looby: Now, when the paddy wagon drives up to the office, you don't see who is in there?

A. Not unless I am looking out the window at something and happen to see it.

Q. Well, you weren't looking out the window on October [fol. 879] 21st?

A. No.

Q. Do you know how many came in the paddy wagon?

A. Yeah. I know all of them that come through that door.

Q. I am talking about when the paddy wagon drove up that Sunday afternoon, you didn't know how many were in there?

A. No, sir.

Q. So since you don't know, you don't know how many more or less. Do you know how many you booked that Sunday afternoon? How many colored persons you booked that Sun.

A. 8.

Q. You didn't book anybody else that Sunday afternoon?

A. I don't know whether there was anybody in there when they drove up there.

Q. Well, please listen to me before you answer. I know you want to tell the truth about it. You don't know how many colored persons you booked that Sunday afternoon on October 21, do you?

A. No.

Q. And you are certain that the charge on which they were booked—other than seeing the warrants—

[fol. 880] A. Other than what?

Q. Other than the warrants you see here? You don't know what charge they were booked on when they were brought in.

A. Nothing but looking at that record.

Q. I am talking about other than this warrant. Forget all about this warrant. You couldn't tell this jury now what charge these fellows—the boys whom you booked on October 21,—what charges they were booked on, could you?

A. Other than going by the record.

Q. And you don't have the record now, so you don't know?

A. I have just had it.

Q. You just had these 8 warrants?

A. That's right.

Q. You can't testify to anything? You can't tell anything except what you see here?

A. I don't understand what you mean?

Q. If Gen. Butler, and he, I believe is a Gen. in the US Army also. If Gen. Butler—

A. I can't understand you. Come over here.

Q. I'll stand here and let you understand me.

Q. All right.

[fol. 881] Q. If Gen. Butler hadn't walked up here with these tell-tale warrants, in his hand, and showed them to you, you would not have known what you had booked them for, would you?

A. No, sir. I remember them coming in. But other than that,—

Q. You remember—you don't remember how many persons were brought in the booking room October 21, 1962?

Q. As a matter of fact you don't recall anything except what you are reminded here, do you?

A. Yes, I remember more than that, but so far as testifying to the charges, and all, I would have to look at that and see that I booked them, and then I could tell you.

Q. But you don't know how many persons you booked that Sunday?

A. I don't have any idea.

Q. More than 20, you think?

Q. I don't know that.

Q. More or less?

A. I don't know.

Q. Well, assuming you booked more than 20, you couldn't identify them, could you?

A. Possibly seeing them. Especially if they are regular drunks I would readily recall them.

Q. Really, between us, now, Sgt., if these 8 got out in the hall and mixed with these other colored people, you couldn't pick them out, could you?

[fol. 882] A. Yes, I could pick that one out.

Q. Is that the only one that you can pick out?

A. Yes, that's the only one I can pick out.

Mr. Butler: If your Honor please, I would like for the record to show that the witness is referring to #4, who has now changed to #8.

Mr. Looby: But you can identify only one out of 8?

A. I didn't understand what you said.

Q. You can only identify one out of eight?

A. One of these, yes.

Q. And so far as you can tell the Court these others could have been in Honolulu on Oct. 21st, couldn't they?

A. So far as me recognizing them.

Q. Yes, sir? Now, isn't it true, as a matter of fact, Sgt. that the Judge of the city court is never there on Saturdays and Sundays but that he signs the warrants in blanks and just leaves them there?

A. Not in his office. He comes in over the week ends and signs warrants, but he has no particular time.

Q. He signs the blank warrants and leaves them there?

[fol. 883] A. He signs the warrants already filled out.

Q. But at the time they were there, you had no blank warrants signed at that time by the Judge?

A. No.

Q. And on what authority did you book them?

A. Beg pardon.

Q. Upon what authority did you book them—did you book them, book these defendants?

A. Arresting officers' arrest slip.

Q. Arresting officer? And they were arrested by Sgt.—

A. Beehan.

Q. Beehan? So that you booked them on the statement of Sgt. Beehan?

A. I booked them on what he said charge them with.

Q. And didn't he tell you to book them on a disorderly charge?

A. I don't know about that. You see, they fill out an arrest slip. When he comes in or sends them in, he either stands there and tells you what to charge them with, or sends them in.

Q. Well, now he told you to book them when he came in [fol. 884] on October 21, 1962? He didn't type anything for you?

A. No.

Q. So these typewritten statements we made long after they had been booked?

A. That last sheet you have there was made right then when they came in.

Q. That last sheet here?

A. The arrest slip.

Q. Will you show me the arrest slip?

A. Right there. That last one.

Q. That was made after you booked them?

A. That was the booking.

Q. Did you type this?

A. That was the booking—right there.

Q. Did you type this?

A. Let me see. I did.

Q. You typed it?

A. Yes.

Q. That was after Sgt. arrested them and brought them in and told you what to book them on and you made that?

A. That right there.

Q. And you booked them for violating the state law regarding set-ins?

[fol. 885] A. Yes, sir. Violation of Chapter 26, Sec. 59 of the Code, state law regarding sit-ins.

Q. Did you think there was a state law regarding sit-ins at that time?

Q. I don't know the law that well.

Q. Well, but you booked them, for what you thought was the law?

A. I booked them for what I was told to book them for.

Q. You were told to book them? You were told that by Sgt. Beehan?

A. Yes.

Q. For City Code, Chapter 26, Sec. 59, state law regarding sit-ins? That is what he told you to book them for?

A. That's right.

Q. And of course you relied on what the Sgt. told you?

A. That's right.

Q. And that was that they violated the City Code, Chapter 59, Sec. 36, regarding sit-ins?

A. 26-59, Sir.

Q. Yes, 26-59, regarding the sit-ins? Of course you believe and rely on what Sgt. Beehan told you? That there was a state law regarding sit-ins?

A. I don't know about that. I just charged him with [fol. 886] what he said charge him with.

Q. You just took what he told you?

A. In other words, I don't know anything about the incident at all. It's just what he said charge them with is what I did.

Q. And that's—now this warrant was typewritten long after you booked them?

A. When we finished booking them, the warrants were made out.

Q. By whom?

A. I don't recall whether I made them, or the other clerk, or who made them.

Q. Well, I notice there is an erasure on here. Do you remember whether you typed anything and then erased it after you typed it?

A. Where is it erased?

Q. I am asking you if you remember typing anything and erasing it after you typed it?

A. No.

Q. You do not?

Mr. Maddin: He said he didn't remember.

A. I don't know whether I typed that one, or not, either.

Mr. Looby: I think he can answer for himself.

Mr. Maddin: If your Honor please, Counsel is trying to misinterpret for the benefit of the jury.

[fol. 887] Mr. Looby: If your Honor please, I think the Court will take care of it, without the assistance of the lawyers.

The Court: O. K. All right. Yes, let him finish.

Mr. Looby: I believe that is all I want to ask him.

The Court: Now, that is all, Mr. Smith.

Mr. Butler: That's all your Honor, for this witness.

MICKEY LEE MARTIN, called as a witness on behalf of the state, testified as follows:

Direct examination.

By Mr. Maddin:

Q. Mr. Martin, will you state your full name, please?

A. Mickey Lee Martin.

Q. What is your mother's name?

A. Lottie Martin.

Q. To your knowledge, was she here on yesterday?

A. Yes, sir.

Q. On October 21, 1962, did you have occasion to go to [fol. 888] a restaurant in this city for lunch?

A. Yes, sir.

Q. What restaurant?

A. B & W Cafeteria.

Q. At approximately what hour did you arrive?
A. Oh, 12:15, something like that.

The Court: A little louder, please.

A. 12:15.
Q. Did you go with somebody else?
A. Yes, sir, I went with my mother and father and my wife and two children.
Q. When you got there was anything unusual that you observed?
A. There was a crowd of white people outside and a group of colored people in the entrance foyer of the B & W.
Q. Would that be between the two sets of doors?
A. Yes, sir.
Q. What, if anything, did you do when you got there?
A. I just walked on in.
Q. Did you have any conversation with any persons there?
A. I just asked them to let me through.
[fol. 889] Q. I see. And having asked them to let you through, what happened?
A. They let me through, and then when my mother and my children and my daddy tried to come through with my wife, they didn't want to let them through, and they asked them—
Q. What did they do to restrain them from coming through?
A. They just blocked the entrance again.
Q. And did you take any steps to relieve that situation?
A. I just got in between them and pushed them back and they come on through.
Q. You had to use force to accomplish that?
A. Yes, sir.
Q. A request was insufficient?
A. That's right.

Mr. Looby: If your Honor please, we object to leading.
The Court: Yes, don't lead him.
Mr. Maddin: State whether or not a request was sufficient?

A. No, it wasn't.

Q. Do you see any of those persons who were blocking that entrance way in the courtroom at this time?

[fol. 890] A. I see one. Yes. The third one from the end.

Q. With his hand on his chin?

A. Yes, sir.

Q. Sitting in the third seat from where I am standing?

A. That's right.

Q. Let the record show, if the Court please, that this is the same man that has been identified as #3.

Mr. Looby: I object to that. He can point him out, and that is all.

The Court: For the record, though, I think it ought to be identified that that is the man who has been referred to as defendant #3.

Q. Do you know approximately how many were in the vestibule at the B & W?

A. Oh, 6, 7, or 8. Something like that. I am not sure.

Q. Were they—can you tell whether they were mixed men and women?

A. No, sir.

Q. You can not?

A. No, sir.

Q. And having gained admittance, was this disturbance still going on when you sought to leave?

[fol. 891] A. I don't believe they were there when we left.

Q. How many persons did you observe or see gain admission to the restaurant without force?

Mr. Looby: If your Honor please, I here object to that question as leading.

The Court: Well, of course, what constituted force is a matter for the jury to determine, but you may ask him what he saw people coming and going doing?

Mr. Maddin: I will rephrase my question. Did you observe any persons trying to get in and out other than those you have already described?

A. Yes, sir. Other people were trying to get in.

Q. State if there was anything unusual occurred.

A. Well, most of them didn't get in. They were all standing outside; when I got in, I didn't pay any attention to the other people. I just went on in.

Q. I see. At the time that you made the request that you be admitted and that the others in your party did, was there any answer given you?

A. No, sir. I don't think nobody said a word—not at that time.

Q. You may cross examine.

[fol. 892] Cross examination.

By Mr. Looby:

Q. Mr. Martin, you did get in, didn't you?

A. Yes, sir.

Q. You had no trouble getting in?

A. No, sir.

Q. Did you have to ask them to let you in?

A. Sir?

Q. Did you have to ask these colored people to let you in?

A. Yes, sir.

Q. And did they let you in?

A. Yes, sir, they let me in.

Q. Well, were you there when the police came?

A. No, sir. I may have been inside.

Q. But you did get in and your people did get in and were served?

A. That's right.

Q. They were serving all customers at the time?

A. Yes.

Q. Did you see a doorman at the doorway holding the [fol. 893] door?

A. Yes, sir.

Q. The inside door?

A. Yes, sir.

Q. Did you see a doorman blocking the door?

A. Yes, sir.

Q. And he let you in?

A. Yes, sir.

Q. And after he let you in, he resumed his task of blocking the door?

A. Yes, sir.

Q. And your mother did come in afterwards?

A. Yes, sir.

Q. And the whole family came in?

A. That's right.

Q. Did you come from the First Presbyterian Church downtown?

A. No.

Q. What church did you come from?

A. We came from the First Assembly of God Church at 11th and Boscobel.

Q. Did these colored people—do you know what they were doing?

A. Yes, sir. I knew what they was doing.

[fol. 894] Q. They were trying to get service, weren't they?

A. They were trying to get in the restaurant, yes, sir.

Q. To get service?

A. Well, I don't know that. I know they was trying to get in. I presume they were.

Q. Well, the restaurant was open, wasn't it?

A. Yes, sir.

Q. And you and some other white people got in?

A. Yes, sir.

Q. In other words, they had a doorman who was blocking the door, and keeping these Negroes from getting in?

A. That's right.

Q. And the restaurant was open to the public selling food?

A. Yes, sir.

Q. Did you go in there and get served and pay for your meals?

A. Yes, sir.

Q. Well, that's what those people were doing there, wasn't it?

A. I don't know that.

[fol. 895] Q. Other people were in there eating?

A. Yes, sir.

Q. Wasn't it largely presumed that they were paying for their meals?

Mr. Maddin: If your Honor please, we are going to object to counsel making a presumption.

The Court: I didn't get the question. Let him ask it again. Don't answer it. Go ahead.

Mr. Looby: Where conditions such as to lead you to logically assume that those people were buying meals and paying for them?

Mr. Maddin: Objection.

The Court: Well, let him answer that.

Mr. Looby: Sir?

The Court: Let the witness answer that.

A. I think they were in there paying for the food, yes, sir. If that is what you asked.

Mr. Looby: Now, these people that were gathered in front there—these white people—they were there when you got there?

A. Yes.

Q. And you went on in?

A. Yes, sir.

Q. That's all.

The Court: Come down, Mr. Witness. You are excused.

[fol. 896] Mrs. Katherine (Vaulx) Crockett, called as a witness on behalf of the state, testified as follows:

Direct examination.

By Mr. Maddin:

Q. Mrs. Crockett, would you state your name?

A. Katherine Crockett.

Q. Just a little bit louder.

A. I am Katherine Crockett—Mrs. Vaulx Crockett.

Q. Mrs. Crockett, you are a resident of Nashville?

A. Yes,

Q. On October 21, 1962, Sunday, did you seek to go to—to have lunch at a downtown restaurant?

A. Yes.

Q. What restaurant was that?

A. B & W Cafeteria.

Q. How did you get there?

A. My husband left me at the front door.

Q. After you had gotten to the front door, were you accompanied by him after you had gotten out of the automobile?

A. Yes, my family came later.

[fols. 897-898] Q. Were they with you, when you entered?

A. No, I walked in alone.

Q. Yes, ma'am? Was there anything unusual in progress at the time?

A. No.

Q. When you went in?

A. No.

Q. How long after you had gained admittance to the restaurant and had gone in, did something unusual occur?

A. About 5 or 10 minutes.

Q. And what was that, Mrs. Crockett?

A. 8 colored men came walking very rapidly and took their place in the vestibule.

Q. Now, does the vestibule have double doors?

A. Yes.

Q. Two double doors, is that correct? One on each—one toward the street, and one set toward the inside?

A. Yes.

Q. You saw 8 colored men come into that vestibule?

A. Yes.

Q. What occurred?

A. Well, the doorman stood at the door.

[fol. 899] Q. What happened?

A. The doorman was standing in the door.

Q. When you went in, what was said?

A. He was very polite.

Q. Did you overhear any conversations?

A. No, I didn't hear except I heard the doorman say—I couldn't quote what he said, but he was very polite, but firm.

Q. What did he say?

A. I am sorry.

Mr. Looby: If your Honor please, I object, she said she doesn't know,—what he said.

The Court: If she doesn't know what was said, I'm afraid,—D you know what he said to the people?

A. I can't quote his exact words.

The Court: Well, do you know in substance what he said?

A. I know in substance.

The Court: Well, then, state the substance of it.

A. I am very sorry. I can not admit you.

By Mr. Maddin:

Q. Did he offer any explanation that you overheard?

A. Not that I heard.

Q. Now,—

The Court: What did she say?

[fol. 900] A. Not that I heard.

Mr. Maddin: Mrs. Crockett, did you remain there in the vicinity of the doorway?

A. I suppose I stayed there a very few minutes, and went upstairs.

Q. What occasion did you have for going upstairs?

A. I wanted to let someone know that the man was standing there along. I didn't want to be around any violence. I had just been quite ill, and—

Q. And who did you tell? Who was this?

A. The lady in the office. Mrs. Carrier.

Q. All right. You then did what, Mrs. Crockett?

A. Then I came downstairs and waited for my daughters to come.

Q. Did you see them arrive?

A. Yes. I did. And I was standing over in the window away from anything that was going on.

Q. What happened when the girls arrived?

A. Well, there was quite a bit of pushing and shoving.

Q. Where did that take place?

A. That was in the vestibule.

Q. In the vestibule?

[fol. 901] A. People were standing on the street, and people on the inside waiting to get out.

Q. I see. Now other than the girls that you have mentioned that were coming to meet you, were there any other persons in that vestibule other than the colored boys?

A. I believe not.

Q. And you observed pushing and shoving?
A. Yes.
Q. Did they get in through the vestibule?
A. No.
Q. Where did they go?
A. I—
Q. When I say "they" I am referring to the girls.
A. I asked them to come around to the back door.
Q. I see. How did you tell them that?
A. By motioning—lip reading, should say.
Q. Did they get near the pushing and shoving?
A. Well, I watched for them. Didn't get anywhere near. My husband did come through and my son.
Q. Were your husband and son with the girls?
A. No. We were in separate cars.
[fol. 902] Q. Did you observe their efforts to get in?
A. No. I was not downstairs at that time.
Q. By that time, you had gone?
A. I had gone.
Q. Was that the last unusual thing that you observed?
A. Yes. We just went on about our business—the children and I—getting served and finding a place to eat.
Q. That was all you observed?
A. Yes, sir.

Cross-examination.

By Mr. Williams:

Q. Mrs. Crockett, when you said there was quite a bit of pushing and shoving—what did you mean by that?
A. People were trying to come in and they could not get in because there was a tight—people were standing close together and they could not get through, unless they forced their way through.
Q. Do you refer to the people on the outside of the door?
A. Yes, sir.
[fol. 903] Q. They were—people were crowding around the outside of the outside door?
A. That's right—trying to get in.
Q. Yes? And so the pushing and shoving was going on on the outside of the restaurant?

A. It was going on between the double doors.

Q. Well, I—

A. Between the inside doors and the outside doors in the vestibule.

Q. Well, now, there was—there is a vestibule to that restaurant?

A. That's right.

Q. How big is that vestibule?

A. Well, I expect it is the space of this area maybe. (She designated sort of an area from the witness stand over to the wall of the courtroom.)

I doubt if it is any bigger than the area of this desk and sitting space.

Q. Well, in terms of feet, do you have any idea how many feet wide, and how many feet long? Do you know how big this is?

A. I would estimate 12 x 12.

Q. That is good enough. Now, there is a door into the vestibule from the outside and there is a door into the [fol. 904] restaurant from the vestibule?

A. Yes.

Q. And you say there were some 8 colored men—Negro men?

A. Yes, sir.

Q. You counted them?

A. I did not.

Q. Why would you happen to know there were 8, then, Mrs. Crockett?

A. Well, I guess because I heard that there were 24 preemptory—I believe the paper said there were 24 preemptory—I believe the paper said there were 24.

Q. So that your testimony, in that respect, is based on what you read in the newspaper?

A. No, I would say there were 6 to 8.

Q. Yes, ma'am? But you testified positively that there were 8 colored men, and that testimony that you gave previously was partially based on what you read in the newspaper, wasn't it, Mrs. Crockett?

A. Partially on that and partially on what I observed.

Q. Yes, ma'am? Because you could not say positively, of

your own knowledge, that there were 8 colored men in that vestibule? Could you?

A. I would say 6 or 8.

[fol. 905] Q. But you could not, of your own knowledge, say positively that there were 8 colored men in that vestibule? Could you?

A. No. I couldn't.

Q. So that your testimony that you gave previously was incorrect in that regard, was it not?

A. Well, I would say 6 to 8.

Q. But it was—

Mr. Maddin: That is for the jury to decide, if it please your Honor.

Mr. Williams: Well, I just want to know—

The Court: Well, she has answered that.

Mr. Williams: You say, Mrs. Crockett, that you were standing by a window at the time the 6 to 8 colored men came inside that vestibule?

A. No, I was standing inside the door waiting for my family.

Q. Just immediately inside the door to the restaurant?

A. I'd say 6 feet from the door.

Q. 6 feet? What were you doing there?

A. Waiting. I was waiting for my family, and my husband.

Q. What did the first Negro person who came into the restaurant—into the vestibule—do?

[fol. 906] A. I don't know.

Q. What did the next Negro person that came into the vestibule do?

A. My recollection is that they all came in about the same time, and stood, and tried to open the door.

Q. Well, how wide was this door?

A. The door is closed always.

Q. How wide is the door leading from the sidewalk into the vestibule? Mrs. Crockett?

A. I believe there were two doors there, and they are normal, business-sized doors.

Q. What kind of doors?

A. Double doors.

Q. And you say those doors—

A. Swinging.

Q. Is each door 3 feet? In width?

A. I imagine.

Q. So that you had an aperture there of 6 feet in width?

A. If you open both doors.

Q. And you are saying that 6 to 8 Negroes passed through that aperture at exactly the same time?

A. No, I didn't say that.

Q. Then I go back to my first question: what did the second person who came into that vestibule do? And you said you didn't know what the first one did. And I said what [fol. 907] did the second one do. And you said you didn't know what the first one did. What did the second one do? They didn't all come in at once?

A. I actually observed them walk in, take their places, and then I looked away. I didn't look what each individual—I didn't even look at them.

Q. Oh, I see, you weren't watching them very closely?

A. I hoped not to.

Q. You didn't want to see them then?

A. No.

Q. All right. Now, you said you saw them come in and take their places. What places did they take?

A. Well, they were just all crowded in there together. I don't know whether they were at arm's length. I don't know whether their elbows touched. They were just in there.

Q. You only know there were some Negroes in the vestibule there? Is that correct?

A. I know there were Negroes in the vestibule.

Q. Now, how did—I want to ask you—how did the door from the vestibule into the restaurant open? Did it open back towards the vestibule? Or did it open forward into the restaurant?

A. Both ways.

[fol. 908] Q. Both ways?

A. The doors are swinging doors.

Q. Did the door have a handle bar on it?

A. I believe not. I don't—I believe not.

Q. Yes, ma'am? Now, when you came in, was the doorman standing there?

A. Yes.

Q. Do you know what his purpose was?

A. I have never been told. Now, if you are going to trip me up, I am sure you are up to something. I have never been told—I couldn't swear what he was up there for.

Q. Believe me, I am not trying to trip you up.

A. All right.

Q. Do you know what his purpose there was?

A. I suppose to seat his customers—no, I suppose to admit his customers.

Q. Well, you—don't you know, as a matter of fact, that he was stationed there to keep Negroes out in regard—

A. I imagine he was.

Q. As have been the stewards of the restaurant? In view [fol. 909] of segregation?

A. I imagine he was there for that purpose.

Q. Now, when the first Negro came to the door,—well, before I get to that—is the door from the vestibule into the interior of the restaurant also a double door? Or is it a single door?

A. I believe double.

Q. Is it a double swinging door?

A. Now, I thought you were asking me about that door before. But I imagine the outside doors have handles. I don't recall observing, but—

Q. But the doors from the vestibule into the interior of the restaurant are swinging?

A. Swinging doors, I believe.

Q. Is it also a double swinging door?

A. I believe. Now, I don't know. But I believe the front doors are not swinging doors. I believe they only open outward.

Q. About how large in stature was the doorman?

A. He was tall, and very slender.

Q. Tall and very slender? How did he have himself posted there from the door—from the vestibule into the interior of the restaurant?

A. I expect he was standing 6 feet from the door.

[fol. 910] Q. Well, did the—do you mean he was standing there 6 feet from the door, and by his very presence was forbidding entrance of these Negroes?

A. He was standing there when he saw them approaching, and then he went up to the door.

A. Now, is it your testimony that—where did he stand with regard to these swinging doors?

A. When do you want to know? When I came in?

Q. No, ma'am. When the Negroes—the colored men, came in.

A. Well, he came up to the doors—both doors—and stood just exactly on the inside of the restaurant.

Q. At the second—

A. No, the first door. He was in the restaurant right at the two doors,—swinging doors.

Q. Yes, ma'am, but what I am asking you is: did he stand in the second of the two swinging doors?

A. Yes.

Q. And, so, with just one man there, he was able to protect the entrance by forced entrance of 8 people—9 Negro men there in the vestibule?

A. No, as I say, I stood there only a moment and went upstairs. When I came back, my husband had arrived, and [fol. 911] had gone upstairs. And Mr. Carrier had come down. But I did not observe, or watch, what was going on.

Q. As a matter of fact, you never did, in effect, see these Negro men that you say you saw there attempt to forcibly gain entrance into that restaurant, did you?

A. I thought I saw a foot go in the door.

Q. You saw a foot go in the door?

A. Yes.

Q. Now, you are positive of that?

A. Yes.

Q. You are positive you saw it?

A. Yes.

Q. You know you saw that?

A. Yes.

Q. You are positive you saw it, now?

A. Yes.

Q. Why didn't you say you saw it before?

A. Well, I guess because I don't ever testify in court. This is my first—

Q. I see.

A. Second experience.

Q. What else do you remember now that you didn't remember before, Mrs. Crockett, regarding any effort on the

part of these Negro men trying to gain entrance into the restaurant?

[fol. 912] A. I—I went upstairs and I wouldn't say that I observed—

Q. Now, you went upstairs and you didn't see anything else?

A. (Hesitates.)

Q. You saw this before you went upstairs?

A. Yes.

Q. And when were you referring to the foot in the door?

A. I was afraid there might be some violence and antagonism, and I decided to leave.

Q. Now, when you thought you saw a foot in the door, in which door was it?

A. The right one.

Q. The right hand door facing you? When you were looking toward the door? Or what?

A. No. The door on my left.

Q. Now, how large was this—how much of the foot did you see? What part of it?

A. Well, I suppose the first part of the foot—the toe.

Q. You—you saw the toe—

A. Yes.

Q. —of a shoe?

A. Yes.

[fol. 913] Q. In the doorway?

A. Yes.

Q. What did the doorman do, Mrs. Crockett?

A. He again said, I am very sorry.

Q. He said, I am very sorry? Did he slam the door back on the foot?

A. I don't think he did. I think he just closed it as firmly as he could.

Q. So the foot, then, was removed when he said, I am very sorry? We can't admit you? Is that correct?

A. Yes.

Q. And you did not see anyone attempt to push his way through that door into the restaurant?

A. Not after that. No, they just stood.

Q. So the only thing that you saw was just somebody beginning to enter with his foot in the door?

A. Yes.

Q. Now, when was it that you say you saw this pushing and shoving—approximately?

A. When I came back downstairs.

Q. When you came back down and you were waiting for your daughters?

A. That's right. I came back and I had to pass—at least [fol. 914] I did pass to go over to get to the window,—windows.

Q. Let me ask you something about the vestibule—is this vestibule completely enclosed by glass?

A. Well, I don't—I suppose from where I was, it was, at all times. I think as you come in the door, on the left, it is perhaps solid.

Q. Solid where?

A. I haven't observed it closely,—very closely.

Q. As a matter of fact, in order to see into the vestibule from the interior of the restaurant, you have got to see through these folding doors that are glass, is that correct?

A. That's right.

Q. Now, when you went over and stood by the windows, which side of the restaurant were you on?

A. Well, from—

Q. To face—

A. I was facing the street.

Q. You were facing the street?

A. On my left of the restaurant. As you face in the restaurant, it was right.

Q. And were you relatively close to the window? That is, I believe they have a big plate glass window?

[fol. 915] A. That's right.

Q. In the back—in the front of the restaurant?

A. That's right.

Q. You were relatively close to the window?

A. I would say within 2 or 3 feet of the front window.

Q. And just from that point you could not actually see into the restaurant, could you?

A. I don't know. I didn't look. I am sure I could have, if I had looked.

Q. Well, haven't you just testified that that side was solid?

A. No, I think that side—I think the other side is solid, that faces the next building which is a furrier, I think.

Q. Well, do you know—

A. But I believe the glass is on the restaurant side of the vestibule.

Q. Do you know? Are you positive of that?

A. I think so, yes, sir.

Q. What were you watching? Were you watching for—

A. I was watching for the girls.

[fol. 916] Q. You were watching for the girls? And this pushing and shoving that you said you saw—was actually out on the street among the white people?

A. No. I didn't really see it, going on out there, at all.

Q. Well, what pushing and shoving was going on in the vestibule, Mrs. Crockett?

A. People trying to get in to be served.

Q. And you saw white people pushing and shoving, trying to get through the Negroes, and were entering the vestibule—

A. Trying to get through, yes.

Q. And that is what you saw? Did you see anybody at all who was not successful in not getting into the restaurant?

A. Well, I actually was not observing that any more other than that I saw people could not get in and people could not get out. And I didn't just stand and watch.

Q. Mrs. Crockett, when you say that people could not get in and out, what you have referred to in your formal general testimony is that people were pushing and shoving to get through the vestibule? Is that correct?

A. Well, as I say—

Q. What you actually mean is that there were some per-

[fol. 917] sons in the vestibule that you referred to as being 6 to 8 colored men, and that, in order to pass from the door —from the front door of the restaurant through the vestibule and into the door from the vestibule into the interior of the restaurant that people had to pass through, or around these Negro men? Is that correct?

A. Wait a minute, now. The only way they could get through, was to push through.

Q. Well, Mrs. Crockett, you say the only way they were able to get through the vestibule was to push. Did you go through the vestibule at any time while this was happening?

A. No.

Q. Did you measure any space in the vestibule while this was happening?

A. Of course not.

Q. You were not standing directly in front of the doors of the vestibule?

A. I was within 5 or 6 feet of the doors.

Q. But you were not standing directly in front of them? Haven't you said you were standing over next to the glass window near the sidewalk?

A. When they approach, I was standing near the hatrack, in order to be out of the way of the line of people being served, and in order to be out of the way of the people who were—coming in, and not wanting to get in that line until we [fol. 918] were all together.

Q. Yes, but Mrs. Crockett, what I am driving at—at the time you were watching—when you were standing by the window on the front of the restaurant—

A. Near the front.

Q. Didn't you say you saw people pushing and shoving—some white people?

A. I saw that as I walked down the entrance lane, and as I walked over to the window.

Q. Approximately how many did you see—how many white people did you see coming in while in that lane?

A. I don't know. I know the Edwards came through at that time, but, I'd say 3 or 4. I think the Edwards came, with their grandson.

Q. You were in their party? Are you acquainted with the Edwards? The people who testified here?

A. Yes, I know them.

Q. Are they friends of yours?

A. They are in my church.

Q. I see. What church is that?

A. The Presbyterian Church.

Q. The Downtown Presbyterian Church?

A. That's right.

Q. Oh, I see.

A. Their grandson was with them, and we were talking about his food, and certain other things.

[fol. 919]. Q. I see we are members of the same denomination, if unfortunately we are not able to be members of the same church.

Mr. Maddin: We object, your Honor.

The Court: Sustain the objection. Members of the jury, don't consider that remark.

Mr. Williams: Mrs. Crockett, then you did see several people come through there?

A. Yes, right at the very beginning of it.

Q. How many people would you say were on the outside?

A. Well, when—by the time I got back downstairs—there were none when I went upstairs that I observed, I didn't really observe, but as I came back down I 'spect there were 15 or 20 trying to gain admittance.

Q. That's—well, wait a minute, Mrs. Crockett,—they were trying to gain admittance? Now, at the time when you went upstairs—there were no people outside trying to gain admittance?

A. At the time I went upstairs, there were none.

Q. And at the time you entered the restaurant there were no people trying to get admittance?

A. No, wait a minute, no. There was no one there at all in the vestibule. I just walked in.

Q. Yes? And then there were no other people entering [fol. 920] the restaurant?

A. Beg pardon?

Q. There were no other people entering the restaurant at the time you entered, were there?

A. Well, what few people you didn't observe. They just walked in and got in line.

Q. Yes?

A. There probably were some who came in after I did.

Q. Well, you don't know that, as a matter of fact?

A. Well, I wouldn't swear to it.

Q. Now, Mrs. Crockett, how long did it take you to go upstairs and notify this person that these Negroes—Negro men—had come into the vestibule?

A. Well, I didn't come straight down but I will answer that question by saying if I had gone up and come straight down, probably 3 minutes.

Q. Probably 3 minutes? Now you are saying that in 3 minutes some 15 or 20 people—all white people—had congregated outside trying to gain admittance?

A. No, I didn't say that.

Q. Well, that is, in effect, what you are saying, isn't it?

A. No, I said I didn't come straight back. If I had, it [fol. 921] would have taken about 3 minutes.

Q. Well, how long did you stay up there, Mrs. Crockett? How long did it take?

A. I lingered up there some 5 or 10 minutes.

Q. All right. And you are saying that within the 5 or 10 minutes, that some 15 or 20 people had congregated?

A. They serve a great number of people on Sundays.

Q. Are you positive that there were not 75 white people?

A. It didn't look like that.

Q. It didn't look like that to you?

A. No, I wouldn't say so. At the time I came back. I went on to be served, and I didn't stay around there long.

Q. Now, when did you say that these people were trying to gain admittance? Will you explain to the jury how you know that all these people were trying to gain admittance to the restaurant—all these white people?

A. Well, I would say on Sunday there are very few—I won't say that they were all—I said the ones I saw that were trying to get in were just waiting,—to get in—standing in line.

Q. And you know they were trying to gain admittance?

[fol. 922] A. The way I know is that there are very few people in town on Sundays. Businesses are not open. And having eaten in town for a number of years, on Sundays,—

Q. You are just surmising, are you not, that these people were trying to gain admittance? You do not know that any one of these 15 or 20 people were trying to get in the restaurant? You don't know that, from your own knowledge, do you, Mrs. Crockett?

A. Well, I would guess so. I feel positive many persons were, I wouldn't say every one in that group was, because they could have been some people passing that were window shopping.

Q. Mrs. Crockett, you understand what I am asking? It is not what you feel, but what you know. Now, do you know that—of your own knowledge—that any one of those people were trying to gain admittance to the restaurant?

A. Well, not knowing any of their names except the Edwards, and they did come in—

Q. Yes?

A. I would say—

Q. You don't know, do you?

A. I don't know that every last one of them were.

Q. Do you know that any one of them would, other than the Edwards?

[fol. 923] A. Well, I didn't see anybody that I knew.

Q. So that the only people whom you know,—the Edwards—of your own knowledge, who were actually patronizing the restaurant came in. Isn't that true, Mrs. Crockett?

A. I know—I didn't see anybody leave—but they probably—

Q. Those who actually meant to patronize the restaurant came in through these Negroes standing in the vestibule, while you were standing there watching?

A. Well, I won't say. I'll just say I don't know.

Q. Well, you don't know that there was anyone out there that would want to patronize the restaurant, do you?

A. I know my family—4 of them.

Q. Now, Mrs. Crockett, you motioned them around to the rear, didn't you?

A. The girls, I did.

Q. And, as a matter of fact, your husband, Mr. Vaulx Crockett, came on through the front door, didn't he?

A. I guess he did. I was upstairs. I imagine he did. My boy said he did.

Q. Your husband, J. Vaulx Crockett, is a member of the [fol. 924] firm of Stockell, Rutherford and Crockett, isn't he?

A. He is, yes.

Q. Mrs. Crockett you are also a very good friend of Mr. Maddin, who represents the restaurant, are you not?

A. I know him when I see him.

Q. You all meet in social circles, do you not?

A. Not often.

Q. But you do, every now and then?

A. Not unless it is a church function. We are not—

Q. Is he a member—is he a fellow Presbyterian with us? (Laughs.)

A. Yes.

Q. Mrs. Crockett, you have discussed this case with your husband, haven't you?

A. My husband and I didn't see the same things. I was upstairs.

Q. You have discussed it with your husband?

A. Very briefly, yes.

Q. How many times have you discussed it with your husband?

A. I don't know.

[fol. 925] Q. Have you discussed it with Mr. Maddin—how many times have you discussed it with him?

A. Not at all.

Q. Not at all with him?

A. No.

Q. You haven't discussed it at all with the Attorney General?

A. No.

Q. Then you haven't even told them what you know?

A. No.

Q. They haven't talked to you at all about it?

A. I spoke to Mr. Butler this morning when I was waiting for an aspirin. That's all.

Q. And you haven't discussed it with the manager of the B & W?

A. No.

Q. How did they know you were willing to testify in this case?

A. I expect my husband told them I would. Glad to do my civic duty.

Q. Now, I think you have already said that there were

several white people who did come in while you were watching there?

Mr. Butler: If your Honor please, that's repetitious.

[fol. 926] The Court: Yes. Sustained as repetitious.

Mr. Williams: Now,—

The Court: You've already been over that.

Mr. Williams: Now, Mrs. Crockett, as these white people came in—through these Negro men—the doorman would open the door and let them in?

Mr. Maddin: We object to that as repetitious.

A. I was—

Mr. Williams: Well, I can ask that, if your Honor please.

A. I'll tell you what I know—

The Court: I think you have—but ask it again, at the expense—

A. I know so little—

The Court: —of being repetitious.

A. I know so little of what went on, and I'll tell what I know, and then let you ask somebody who was down there, and saw what was going on.

Mr. Williams: Well, what I was thinking—let me ask you who was down there—and this pushing and shoving that you saw was some white people coming through these Negroes in the vestibule at the—to get into the restaurant?

A. Yes, and my little boy was one of them.

Q. Yes? And you watched him come in?

[fol. 927] A. No. I won't say I watched him. I don't know whether I saw him come in, or not.

Q. Well, were you out there—

A. I was trying not to see anything that went on, so I went—

Q. Well, you actually didn't see much of anything, Mrs. Crockett?

A. I saw the crowding. I saw people force their way in and I saw people trying to get out, and just standing waiting to see what they could do.

Q. Now, what you saw was people coming through the Negroes who were standing in the vestibule, and they were trying to be admitted to the restaurant by the doorman? Right?

Mr. Maddin: If your Honor please.

The Court: Let her answer that. I want to get that behind me once and for all.

Mr. Williams: Isn't that what you saw?

A. I probably saw one or two coming through after I had been upstairs and had come back down.

Q. And the doorman did open the door and let them in at that time? Do you know?

A. I don't think there was any matter of opening the door. What I saw was the door that could just be pushed open from the outside—from the vestibule.

Q. Oh, then you mean the door was—

[fol. 928] A. Beg pardon?

Q. —partly open?

A. By the time I got back downstairs, my husband, I believe, was down there.

I won't—won't say much about that because I was standing over at the window when people were coming in, and I was not observing, while they were coming in and going out.

Q. Yes? Well, as a matter of fact, you don't know much about what happened, do you? Now, of your own knowledge?

A. I— I—

Q. You are giving impressions, here, impressions that you had, are you not? You didn't go over there and watch anything closely enough to actually know what was going on, did you?

Mr. Maddin: If your Honor please, Counsel has asked this witness that very same question, in one form or another, at least a dozen times.

The Court: Well, you might be high on the number of times. I think the witness has been—and I think the jury knows what is going on, what she is testifying to.

Mr. Williams: Well, may it please the Court, I hate to be limited in my cross examination of the witness.

The Court: Well, let's—I don't know— I don't want to limit you, but at least, let's not go over the same thing [fol. 929] more than 3 times.

Mr. Williams: When—

The Court: Because I assume this jury is listening. I am.

Mr. Williams: Well, if the Court please, when I ask her something specific, she always gets back, reverts back to, well, I wasn't watching, I didn't see much. So now, I'm asking, and maybe I have asked it before,—

You don't know very much about what happened at all, do you? You are just giving impressions? That is true, isn't it?

A. Except that I saw the men.
Q. You saw the men there?
A. And I saw—
Q. And you saw some people elbowing through them?
A. Yes.
Q. Is that correct?
A. Uh-huh.
Q. That's all.

Redirect examination.

By Mr. Maddin:

Q. Mrs. Crockett, have you told us to the best of your ability what you saw?
A. Yes.
[fol. 930] Q. That's all.

The Court: Come down, Mrs. Crockett.

Vaulx Crockett, called as a witness on behalf of the state, testified as follows; having been sworn by the Clerk:

Direct examination.

Br. Mr. Maddin:

Q. Will you state your name?
A. Vaulx Crockett.

Q. Your occupation?

A. Lawyer.

Q. On Sunday, Oct. 21, 1962, did you have occasion to have lunch at a downtown restaurant?

A. Yes.

Q. What restaurant?

A. B & W.

Q. Did anyone accompany you to the restaurant?

A. My family. We were all going to eat there.

Q. And did any of you get there before others? Or did you arrive simultaneously?

A. Well, we—

[fol. 931] Mr. Looby: I would like to hear Mr. Crockett.

The Court: A little bit louder, Mr. Crockett.

A. Could I have a glass of water?

The Court: Yes, sir. You can.

A. My throat is dry.

The Court: (Has him furnished with a glass of water.) All right.

A. As I recall, my son and I had put my—let my wife out of the car, and we had gone to park the car. My daughters, I think, were in another car. We were operating two cars.

Q. And so your wife got out first?

A. Yes.

Q. And you and your son were together?

A. Yes.

Q. Did anything unusual happen in front of the restaurant when you first let your wife out?

A. Not that I observed.

Q. When you returned to the restaurant, what did you observe? In front of the restaurant?

A. Well, there were people standing in front, and in the vestibule there were colored people that massed or assembled and couldn't get in.

Q. Did you take occasion to count the colored people?

[fol. 932] Do you know how many were in the vestibule?

A. No, sir, not exactly.

Q. Could you estimate the number?

Mr. Williams: If your Honor please, we object to an estimate.

The Court: No. That's all right. Estimate it.

A. Well, it was 7 or 8 or 10.

Mr. Maddin: Between 7 and 10?

A. Yes.

Q. Now, Mr. Crockett, from the time you reached the front door of the restaurant, describe what occurred, and what you observed—in your effort to gain admission to the restaurant?

A. Well, we were rather perplexed as to what to do. My wife was inside. And nothing really much occurred in the way of events, except people just circulated around. People would come, some would stay, some leave.

Q. Specifically, Mr. Crockett, in seeking to pass through the vestibule area, what, if any force other than the force of walking did you find necessary to pass through that crowd?

A. Well, we stood around for some little while, and then Mickey Martin,—he is bigger than I am—quite a bit—I believe his mother was inside or outside. I am not sure. But he started through. He pushed his way through and [fol. 933] he had some words, as I recall, and I believe his mother came through with him, I am not sure. I then tried to get through and did push my way through with my boy after we had been there a while.

Q. Did you have any conversation with the colored men who were in the vestibule area before you got through?

A. I don't think I said a word to anyone.

Q. I see.

A. I did a little pushing. But I didn't have anything to say.

Q. Now, having gained access to the interior of the restaurant, what did you do?

A. Well, things were in confusion there. I forget exactly the sequence of events, but I believe Mr. Carrier—I believe asked me—

Mr. Looby: If your Honor please, don't tell what he said.

The Court: Yes. That wouldn't be competent. He asked you a question, Mr. Crockett. He asked you when you got in the restaurant, what did you do? I believe that was the question.

A. As I recall, I made a telephone call. That's what I was getting at.

The Court: All right, you made a telephone call.

Mr. Maddin:

Q. Whom did you call?

A. As I recall, I called the police.

[fol. 934] Q. That was in answer to my question?

A. Yes.

Q. Having called the police, you, of course, were not in a position to observe all that was going on right at that time?

A. That's true.

Q. Did you return to the area of the front door?

A. Yes.

Q. And what did you observe going on there?

A. Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. And the police came and then they—it was a question of what to do then. I was talking to some of the policemen, and I was a lawyer, and they thought I knew everything and could solve the situation, and I must admit that I didn't know what to do myself.

Q. All right. Mr. Crockett, at the time that you had returned to the door, after having called the police, approximately how much time elapsed, while there was a crowd of people standing on the inside, and a crowd of people

standing on the outside, before anybody could pass freely through that passageway or vestibule?

[fol. 935] Mr. Williams: We object to the question as being incompetent, if your Honor please.

The Court: Well,—

Mr. Williams: It draws a conclusion. The witness couldn't testify as to what happened, is not entitled to conclusions.

The Court: Well, as best he can. The jury can take into account the weight to be given it.

Mr. Williams: Respectfully except.

The Court: All right.

Mr. Maddin: Go ahead.

A. Do you mean from the time I was first on the outside?

Q. No. Because I want to show the jury the time that you were there at the doorway, till the time they arrived, when there was no passage of customers en route.

A. Well, I would say somewhere between 15 and 30 minutes, but I am not sure. It was very unsettled at the time.

Q. Now, Mr. Crockett, once these officers were able to make passageway through this vestibule area, would you estimate the number of persons that came in off the street or went out of the restaurant?

A. You mean—

Q. Immediately.

A. —before these colored fellows had been removed, or while they were still there?

Q. Well, my only interest is after the police force had [fol. 936] gotten there, and had made passageway through the vestibule—approximately how many people moved into —or out—immediately, one way or the other?

A. I don't believe I could estimate.

Q. Would you say there were people who did—few or many?

Mr. Looby: I object to the question, if your Honor please.

The Court: He mighty near answered that question. He said he couldn't estimate.

A. Well, it wasn't cleared up at first. Once they started through freely, that was it.

Mr. Maddin: Approximately how long afterward from the time the police department representatives got there did it clear up? And there was free passageway through it?

A. (Hesitates.) Well, now, let's see—we was talking to the police, I'd say for 10 minutes, at least, before—

Q. After the passage was free—after that time?

A. As I recall, it was not free until after the people were removed and taken away,—

Q. All right.

A. —to people passing through.

The Court: That is what he is asking you—how much [fol. 937] time elapsed from the time the police came until people were gotten out of the vestibule. That's all he asked, I thought.

A. Yes, sir.

Mr. Maddin: Once they had worked out—

The Court: Well—now—now, what was his answer to that? Did he ever answer it?

Mr. Maddin: 10 minutes. (Reporter's note: He is evidently referring to answer made on page 936, for no answer was recorded in shorthand, nor does one show on the Tandberg tape recorder in answer to the Court's question just above.)

The Court: Sir?

Mr. Maddin: Approximately 10 minutes.

The Court: Is that right?

A. 10 to 15 minutes.

The Court: All right. I didn't get that.

Mr. Maddin: Approximately, I will ask you, what—how long after it was cleared until traffic was passing through that restaurant—in and out?

A. Well, it was—I couldn't say so many a minute that I saw, but it was the usual volume of trade, except—I mean there wasn't as many people as you'd find on other days.

Q. The volume of people built up on either side?

Mr. Looby: He is leading him now, if your Honor please.

The Court: Well. Don't lead him, now.

[fol. 938] Mr. Maddin: State how many crowds were in the immediate area of the restaurant.

Mr. Williams: He is still leading him if your Honor please. I know he has to lead him to try to make his case, but—

Mr. Maddin: I object to that remark, if your Honor please.

The Court: No. That remark was not proper. I will try to keep Counsel in line so far as leading, and I am sure that—now, Mr. Crockett is a lawyer, and an intelligent witness, and a—now, ask your question again, and before he answers, let me rule as to whether it is proper.

Mr. Maddin: Mr. Crockett, did you see any unusual assembly of people in the vicinity of the vestibule?

A. Not after they were removed.

Q. Or at the time that they were still there?

A. No.

Q. I am talking about when you were there—in the vestibule—did you see any unusual assembly of people?

A. Well, the colored boys remained in the vestibule.

Q. I am talking about when these 8 or 10 Negro men were in the vestibule, either exterior or interior, were there any assemblies of people.

(Mr. Maddin and the Court both talk at the same time.)

[fol. 939] The Court: While they were there did you see any unusual assembly of people?

A. Well, I don't recall any assembly after the—

Mr. Maddin: I am talking about when these 8 or ten Negro men were in the vestibule. In the vicinity of the vestibule either interior or exterior, if you saw any assembly of people?

A. Well, I still don't know that I fully understand what period of time you have in mind. Of course they were still blocked on the inside, and there was a crowd inside and outside.

Q. All right. Now, then, when that had been unblocked,—What happened? Where did they go?

A. Well, the crowd inside went out, and the crowd outside came in. The crowd outside which remained came on in.

Q. All right. Can you estimate the amount of people in each of those two groups?

A. No, sir, I couldn't.

Q. Were there few or many?

Mr. Looby: If your Honor please, I object to that.

The Court: Let him answer the question.

A. It was a substantial number.

[fol. 940] The Court: A substantial number is pretty relative, Mr. Crockett.

Mr. Maddin: You may cross examine.

The Court: Gentlemen, I think it's our noon hour, that's arrived. Let's defer cross examination until after lunch. Be careful, gentlemen of the jury, and do not discuss the case among yourselves. Come back at 1 o'clock.

(Thereupon the trial is adjourned at 12:00 o'clock noon.)

Afternoon Session

1:06 o'clock P.M.

The Court: Gentlemen, are we ready to bring down the jury?

Mr. Looby: Yes, your Honor, we are.

The Court: Bring them down.

(The jury is brought into the courtroom.)

The Court: All right, gentlemen, you may cross examine.

Cross examination.

By Mr. Looby:

Q. You are Mr. J. Vaulx Crockett?

A. Yes.

Q. You are a member of the firm of Stockell, Rutherford and Crockett?

A. Yes.

Q. You are a member of the Downtown Presbyterian [fol. 941] Church I presume?

A. I am.

Q. You have talked with Mr. Maddin about this case?

A. I have talked with him briefly, yes.

Q. When?

A. I don't recall exactly—I think it was on the way out, though. He stopped as my wife and I were leaving and talked. We didn't talk about the evidence in the case—not a thing.

Q. Was that on the 21st day of Oct., 1962?

A. What did you say?

Q. Was that the 21st of October, 1962?

A. Was what on the 21st?

Q. You said you talked to him briefly.

A. I don't—I am sorry but I do not really understand the question.

The Court: He said that you—

Mr. Looby: You and I have had cases. Why can't you understand me today?

A. I can't explain that. I have had difficulty in arriving at the same conclusions in cases, and understanding your viewpoint on the case we have had. It may be we have something to do with that.

[fol. 942] Q. But we have managed to understand each other?

A. I don't know. I didn't when you were on the other side, then it was rather strained.

Q. But we have always managed to understand each other?

A. I don't know that we have. I just couldn't testify that we have always understood each other.

Q. Now, when did you talk to Mr. Maddin about this case which we are trying?

A. I talked to him when we were—I talked to him when the jury was being selected on several occasions about when to be here. I can't give you the occasions. It would generally be before leaving the courtroom. I was really not in the courtroom, and I would try to leave word where I would be, and then he would call me after the case was started, after the evidence was started and he said that the case had started, and that probably he would need me at a certain time.

I believe that was 9:30 this morning.

Q. Well, have you talked about the evidence in the case?

A. No, sir, I have tried to avoid it just to observe the—

Q. So he didn't know what you were going to testify to today?

[fol. 943] A. Well, I would say he did know generally what I was going to testify to, yes, because I think I talked to him before the case was even under way—before he was in it, actually.

Q. I didn't understand that last.

A. I said I think I talked to him before he was in the case, I think we had some discussions about it, yes, sir.

Q. Did you know at that time that he was the lawyer for the B & W Cafeteria?

A. Not when I first discussed it with him. I didn't know that he was the lawyer in this case.

Q. How did you happen to be discussing it with him?

A. Well, Hugh Gracey was the lawyer and we were in City Court—I don't know, I believe it was, and Hugh was there, and we had some discussion.

Q. And you were there?

A. Yes, I was there. I was subpoenaed there.

Q. And you had some discussion?

A. Yes.

Q. Now, you have been at the B & W Cafeteria a number of times, haven't you?

A. I am sorry, I couldn't hear you.

[fol. 944] Q. You have eaten at the B & W Cafeteria several times?

A. Yes.

Q. To be served on numerous occasions?

A. I am sorry I didn't hear you.

Q. (Repeats.)

A. Yes.

Q. And you know the place very well?

A. I know it very well, but I couldn't give you the details because I am not good at it.

Q. Did you talk to Mr. Carrier on the 21st of October when these colored people were in the vestibule?

Mr. Maddin: I didn't understand the question.

Mr. Crockett: I didn't hear you.

Mr. Looby: Did I understand you to say you talked to Mr. Carrier on the 21st of October, when the colored boys were in the vestibule.

A. Yes.

Q. Did you advise him?

A. I talked to him. I don't know whether I advised him. I was trying to be helpful.

Q. And you are the man who called the police?

A. I believe I called them once. They may have already been called.

Q. Do you know that seeking entrance—that they were [fol. 945] seeking entrance in the vestibule to patronize the place, don't you?

A. Mr. Looby, I don't know what they—I have no knowledge of my own that I could testify to.

Q. Well, why did you call the police if you didn't know what they were there for?

A. Well, I called the police because the people outside that wanted to come in couldn't get in, and the people inside that wanted to get out couldn't get out.

Q. And they couldn't get in because of the doorman? Isn't that true?

A. Well, they wanted to get in and the doorman was holding the door. Now what they wanted—what they could have done, I don't know. They had—

Q. But you know they wanted to come in and the doorman was blocking the door?

A. I don't know what they wanted, Mr. Looby. I am up here to testify to what happened to some extent, and do well to do that.

What they wanted—what their objective was, I do not know, other than the circumstances.

Q. Do you know why they wanted to get in? Is that what you are telling the jury?

A. I am not telling the Jury that I don't know. I am not telling it in the sense that they didn't want to get in. [fol. 946] I'm just saying that I'm not going to testify about their purpose, because that is a thing that I cannot testify about, cause I understand—

Q. Mr. Crockett, you were on the inside, and they were in the vestibule, and white people on the outside. How can

you testify to the jury that all the white people wanted to get in, when you don't know whether these Negroes wanted to get in or not? Mr. Rutherford?

A. That what? My name is Crockett.

Q. I know it isn't Rutherford.

A. I didn't understand you.

Q. The question is this: You testified that the white people on the outside wanted to get in? Didn't you?

A. Yes.

Q. And you were on the inside?

A. That's right.

Q. And these people were in the vestibule between you and the white people?

A. Yes.

Q. And Mr. Rutherford—

Mr. Maddin: Just call him Rutherford.

Mr. Crockett: We need to get all the advertisement we can. Just go ahead.

Mr. Looby: How do you know what the white people wanted to do on the outside, and you didn't know what the Negro boys in the vestibule wanted to do?

[fol. 947] A. Well, I would say I can answer that by giving two reasons: First is, as you brought out, I have gone there for many years and customarily, people who approach the door, look in, and do come on in,—most all of them would come on in. And the people who have eaten—they would usually come out. Then, they did come in, and they did go out. Some of them. Not all of them. In the course of that later on. I don't know if it was the same people, but that's something I have seen happen.

Q. So from your experience—

A. Now, another thing, as far as colored people are concerned, I am not familiar with that situation. I don't know what they had in mind, myself.

Q. But you—

A. I would assume that they did. I don't want to argue, but I just don't know their—

Mr. Maddin: Now, if your Honor please, there is something we are objecting to. Counsel has argued that all the way through the direct examination.

The Court: Well, I guess there would no harm in letting Mr. Crockett answer.

Mr. Maddin: The only harm is the bending of the rules that go on in the courtroom where they object to our arguing something, and then they want to come in here and ask the Court to allow them some assumptions or conclusions. [fol. 948] Regardless of what it is, it isn't admissible.

Mr. Looby: I didn't ask for a conclusion.

The Court: I will have to conclude, I think, that Mr. Crockett's assumptions would not benefit the jury. Now, what he saw there would be very helpful if he tells Counsel that. Just tell us what you saw there, and answer his questions. I think you can do it. I don't believe, though, anything would be gained by asking him his assumptions.

Mr. Looby: Now, Mr. Crockett, you have already made a statement that the white people wanted to come in—were you making an assumption?

A. Well, I don't think so, because the white people would come in when the obstructions were removed, and they have come in customarily.

Q. Name some white person who was standing out there and couldn't get in and who came on in.

A. (Hesitates.)

Q. A little louder, please.

A. Well, I was trying to think of names. And, well, I can't think of any individuals at this time.

Q. I'll wait.

A. Of course Mickey Martin couldn't get in at first, and his mother, and had to push their way in. I have already named him.

Q. Would you be surprised that Mr. Martin said when he asked them to excuse him, they did, and he came on in. [fol. 949] Did you know that?

A. Do I know what?

Q. Did you know that Mr. Martin testified before you did, and I think that the record will show that he asked them to excuse him, and they did, and he came on in. Did you know that happened?

A. I didn't know that happened. I heard him say, My mother is going to get in, and I am, too. That's what I heard him say.

Q. Where were you when he said that?

A. I was right there—

Q. Sir?

A. I was right behind him, out on the street.

Q. You came on in, didn't you?

A. Yeah, I did after that.

Q. You come in after Mr. Martin?

A. Yes, right after he did.

Q. Did you hear Mr. Martin ask them to excuse him?

A. I didn't hear that. After he said what I have recounted, he went on through.

Q. About how far is the Downtown Presbyterian Church from the B & W?

A. It is one block west. The Downtown Church is at 5th and Church, on the southeastern corner. Go one block east [fol. 950] on Church and then approximately ⅔ or ¾ block north on 6th, and that is the distance.

Q. On numerous occasions you have gone to that cafeteria through the back door, haven't you?

A. On some occasions, yes.

Q. How did your children get in there that Sunday?

A. Well, as I recall,—of course, I didn't see my daughters get in—it would be hearsay, but I will be glad to give it to you if you want it.

Q. I don't want any hearsay. I want it on what you know. You don't know how they got in?

A. Well, I don't think my daughters went through the front door. I don't know that they did.

Q. Well, Mr. Crockett, we don't want to know what you think, but what you know.

A. Well, I am testifying to the best of my recollection. I think they went in another way.

Q. But you don't know?

A. They did get in.

Q. How did your son get in?

A. With me.

Q. And after you got in, you were served, weren't you? After you had gotten in and given your advice, and had called the police, you were served?

[fol. 951] A. As I recall, it was a good while after that before I was served.

Q. A good while after what?

A. After I got in.

Q. Were the police in there?

A. I don't think I was served until after the thing had cleared up.

Q. Was there anything to prevent you from being served?

A. I don't know. I don't know whether there was. I was out there.

Q. You were so anxious to call the police you didn't know when you were served and get the police over there?

A. I think—I wasn't anxious to call the police, but I was anxious to get the situation relieved.

Q. And you thought the way to relieve the situation was by calling the police?

A. Well, I didn't know what to do. Really; I tried that.

Q. Didn't the police consult with you when they got there?

A. I talked to them.

Q. Well, the police consulted with you, didn't they? Mr. Crockett?

[fol. 952] A. So far as the word "consulted" I don't know what you mean by it. I talked to them.

Q. I mean to know what to do.

A. Well, they talked to me. Whether they knew more, or I knew more, whether they were listening to me, telling them what to do, I don't know.

Q. Did you advise them to arrest them?

A. Well, I would say that I did, yes, sir. I wouldn't say it was advising them. I was for it. I tell you that. That was the only thing I could think of, gentlemen. I tried to think of everything else.

Q. For what reason—because they came to a place where they served only white persons for a meal?

A. What was that?

Q. For what reason, or what purpose, or what charge did you advise their arrest?

A. I don't think I suggested the charge.

Q. You just advised a blanket arrest?

A. I wouldn't say I advised it. I advocated it. But I don't know as I—in other words, I suggested it.

Q. And you advocated it, or suggested it—whatever way you want to put it—the arrest on what charge?

A. Uh—the officers, as I recall it, suggested disorderly [fol. 953] conduct,—wait a minute, now, I don't think I advised anything. I said, Go ahead and do it, and let's get this thing cleared up and get it open.

Q. And the officers consulted you because you are a lawyer?

A. Yes, sir, but I am no criminal lawyer, and they didn't do much by consulting me, I'll have to admit, because I didn't know what to do

Q. Nevertheless, you suggested the arrest, or advised the arrest, or agreed with the arrest, simply because they went to a white place seeking service which was being offered to all white people?

A. Well, my interest was to help, if I could, to get it open and get the thing quieted down, and people going in and going out.

Q. What were you there for?

A. What was I there for?

Q. Yes, sir?

A. I came to eat dinner—Sunday dinner.

Q. You came to eat dinner?

A. Yes, sir.

Q. Do you know that you came for the same purpose that the Negroes came there for?

Mr. Maddin: We object, if the Court please. Counsel is just being repetitious, like last time.

[fol. 954] The Court: He said he didn't know what they were there for.

Mr. Looby: You say your interest was in getting them quieted down. Why didn't you ask the man to let them in and serve them, if you wanted to get things quieted down?

A. Well, for two reasons. That was his business, and not my business; and, second, if it had been my business, I would think it would have been very unwise to have done it.

That's my opinion about it, as far as the business is concerned.

Q. It is his place of business? Is that what you said?

A. No, I said that decision, I think, is strictly up to the management of the business.

Q. Then why wasn't that left to management instead of your advising them?

A. Well, I guess it was. I was just trying to—they seemed to think that I, being a lawyer,—I am not a criminal lawyer that I would know what to do, and I just kind of fumbled through the best I could. And that is the way I fumbled through.

Q. Now, you said "they"—the management or the police?

A. The management and the police, and they advised with me. Nobody knew what to do, including me.

Q. When you conferred with the police was management [fol. 955] present?

Q. Well, he was partly, I mean, it—he was back and forth some. We were just standing around and trying to figure out what to do.

Q. Specifically, when was it suggested or when was it agreed upon or fixed on, when it was done—with the police and when these Negroes were arrested, was the management there?

A. I couldn't identify the exact moment that the decision was reached. And I couldn't say whether—I just can't answer that question—I don't know when the decision was reached.

It was sort of a milling around situation, where there was great confusion. All these people milling around in front. People out front, and nobody knew what to do, and I don't know how to answer that, that question.

Q. So the great question that perplexed you as to what to do, you knew what the answer was then, and you knew how to advise them?

A. Repeat that, please.

Q. Did you know, at that time, that when they were perplexed as to what to do—you knew what the answer was then, and you knew how to advise them?

A. I don't know what the answer is now, Mr. Looby. I didn't know then. I am not a criminal lawyer and I haven't [fol. 956] had a case in criminal court in I don't know when.

Mr. Looby: You have said that a dozen times.

Mr. Maddin: He has asked the question that many times, if your Honor please.

The Court: No, don't—don't—

Mr. Looby: Now, Mr. Rutherford—Mr. Crockett, I believe you said that when you got up there, some people were in front of the restaurant?

A. Yes.

Q. White people?

A. Yes.

Q. How many?

A. Well, gosh. I'd say probably 8 or 10, first, then more would come up, and some would leave. And you just can't be sure about the exact number.

Q. Do you know, Mr. Crockett, whether or not that most of them just came because of curiosity, because the Negroes were in the vestibule?

A. So far as I know, none of them were there for that purpose. They all appeared to be, as far as I could tell, to eat lunch. Most of them, so far as I could tell. They looked like it, exchanging glances, and all that. That was the conclusion I drew. You asked me the question, and that is my conclusion, that I drew.

Q. How did you make your conclusion?

A. Just their appearances.

Q. In other words, you simply gave an opinion?

[fol. 957] A. Well, I told you—I don't know. If you can determine from looking at the people, I think you can determine if they want to get in, or just looking. So I determined that they wanted to get in.

Q. You mean you can just—

A. I wouldn't guarantee my conclusion. But I would bet money on it. I wouldn't guarantee it.

Q. You would bet your money on it?

The Court: Now, let's get along, gentlemen. All right. I am afraid we are killing time now.

Mr. Looby: Do you mean to say that none of them were milling around from curiosity?

A. I didn't say none of them were.

Q. What proportion of them gathered around for killing time?

Mr. Nichol: If your Honor please, these speculations are not worth the time.

Mr. Butler: He has already said he didn't know.

The Court: Just to cut the thing short, how if you know the answer to it, tell him, Mr. Crockett, what percentage of them you think were onlookers, and what percentage you think were coming in.

A. I would say the larger proportion.

The Court: Well, what is larger? Give it in per cent.

[fol. 958] A. At first? I believed you asked me about at first. Well, I don't recall anybody—I believe you asked me about at first—that was there at all, that appeared to be onlookers; till I got in, I don't recall anybody.

Q. Well, when you got there, how many were there?

A. I thought about 8 or 10.

Q. And you went right on in?

A. I didn't go in right at first. I stayed out quite a bit before I went through.

Q. Why did you stay out?

A. I didn't think I could make it until Mickey Martin, whom I knew, he is bigger than I am. And I thought if he could get in, I could.

Q. And how many when you got there?

A. I don't know. I wasn't—

Q. About how many?

A. I don't know. I was paying attention to getting in and I don't know who else was there.

Q. About 10?

A. I said I didn't know.

Q. Can you give an estimate?

Mr. Maddin: We object, if the Court please.

The Court: He says he doesn't know—can't estimate.

[fol. 959] Mr. Looby: Now, when you got in there, the doorman was holding the door, wasn't he?

A. The doorman was holding the door?

Q. I am asking you?

A. I think so.

Q. And he opened the door and let you in?

A. That's right. He let me in. I got in.

Q. And that was after Mr. Martin got in?

A. Yeah.

Q. And then after he let you in, he closed the door?

A. Well, he was—I guess he did, yeah.

Q. Well, you know whether he did or not, don't you?

A. I didn't make any mental note of what happened as to whether he closed the door, or not. I'm just sort of giving my best impression of it.

Q. But did you see—

A. He kept on holding the door. I would say that.

Q. And he let all the white people in that wanted to [fol. 960] come in?

A. I don't recall anybody coming in up to that—there could have been somebody else who came on through but most of them didn't come in.

Q. Do you recall any people who wanted to come in that the doorman kept out?

A. That the doorman kept out?

Q. Yes?

A. No. I don't recall.

Q. And so all the white people that wanted to come in, got in and he kept the Negroes out? Isn't that true?

A. The doorman—he was keeping the niggers out, but the niggers was keeping the white people out.

Mr. Williams: If the Court please, we object to Counsel using the word Negroes the way he is pronouncing it, as a matter of prejudice. We don't care how he feels about it, his personal preference, but he has no right to bring derogatory language into this courtroom.

The Court: Who are you talking about? I don't know who you are talking about, gentlemen.

A. He said Counsel. You mean me?

Mr. Williams: Yes, sir.

A. Did I use it.

Mr. Looby: Repeat the word you said.

[fol. 961] A. I said Negroes. Is that—improper?

Mr. Looby: That is very proper, if that is what you say when they come to your office.

A. I thought I did. I really thought I did.

Q. What is this?

A. I thought I used it the right way. I didn't realize I—

Mr. Maddin: If the Court please, this is getting ridiculous.

The Court: Now, gentlemen, let's get along. Let's get along. If he—he can call people what he pleases. That's his business.

A. Let me—

The Court: All right.

A. Let me say I don't mean anything by—

The Court: Just answer the question. Mr. Witness, just answer the question, that Counsel asks you.

A. O.K.

The Court: Let's move along. All right. Just answer the questions as nearly as you can without too much elaboration and I think we will move along as we should be.

Mr. Looby: Now, I believe Mr. Martin went in first and then you went in right after him?

A. I believe so.

[fol. 962] Q. And his mother went in after him? Did you see his mother come in?

A. I think she went in with him. She may have gotten in before he did. I think she went in with him. I remember him saying, That's my mother, or That's my mother in there. I am not quite sure of her coming in.

Q. Was that in front of you or behind?

A. He was in front of me.

Q. And his mother was in front of you?

A. Whether she went through there, or whether she was inside, inside the door, I don't recall.

Q. Do you recall Mr. Edwards going in?

A. I saw Mr. Edwards inside.

Q. He was in there before you got there?

A. I believe he was. I don't have any recollection of when he came in.

Q. Did you see Mrs. Edwards in there?

A. Later on, I saw them there.

Q. Did you see two ladies, guests with her?

A. Two lady guests with them?

Q. Yes?

A. I don't remember. I may have, but I don't remember it.

Q. You said there were some people on the inside waiting [fol. 963] to get out?

A. Yes, there were.

Q. How many?

A. I would say it ran from 8 up to 25 would be my best recollection.

Q. Or people waiting to get out and couldn't get out?

A. They appeared to be.

Q. The back door was open? The back entrance?

A. I do not know.

Q. Your daughters came through the back entrance, didn't they?

A. I understand they did, but I don't know.

Mr. Butler: We object to that, if your Honor please. We have been through that three times at least. He said he didn't know how the children got in there. He thought they didn't come through the front entrance. It is repetitious. He thought that it was some other entrance, but he didn't know. Now, we have gone through that, I know, three times.

The Court: Well, I think he did say that, sir.

Mr. Looby: I would like to be heard on it if I have to go through it three more times.

Mr. Butler: We are objecting to it, if your Honor please, and on the grounds that it is repetitious.

The Court: I sustain the objection to it. I think it is repetitious, so now, let's get on, to something new. Don't [fol. 964] ask him about that. You may ask him about the back door.

Mr. Looby: Now, as to whether or not these people you said wanted to get out and couldn't get out, the back door was available?

A. Back door what?
Q. Was available?
A. I don't know.
Q. Well, you know where the back door is, don't you?
A. I know where it is. You can't see it from up front.
Q. How is that?
A. You can't see it from the front, though.
Q. Do you remember any of the people you saw up there —one or two of them?
A. No, I can't. Probably could think of them tonight, but I can't do it—
Q. But you can do it tonight?

The Court: He says he cannot think of them.

Q. We would like to have them today. We don't want them tonight. Was there anybody there that you knew?
A. Well, I knew the Edwards, of course.
Q. I mean who were trying to get out and couldn't.
[fol. 965] A. I don't believe there was.
Q. Did they tell you they wanted to get out and couldn't?
A. No, sir. Well, I don't think they did.
Q. How do you know they wanted to get out and couldn't?
A. Well, they stood out there where you can only get out.
Q. How long did they stand?
A. Well, some stood longer than others. I can't tell you how long they—even one or a group—stood.
Q. How long were they standing there—from the time that you got there until the police came and got them out?
A. Well, I was laboring under considerable stress myself. I couldn't give you an accurate statement of the exact time—anywhere near the exact time. Because I wasn't conscious of that. I would say—I will undertake it under those qualifications—oh, 30 minutes, approximately, more or less.
Q. And those people standing there and waiting 30 minutes to get out?
A. Which people stayed where? You mean—.
Q. The people who wanted to get out?
A. Well, I don't know. I'm talking about up to the arrest.
[fol. 966] Q. And they got out after the arrest, didn't they?
A. Yeah.

Q. And they had been waiting 30 minutes before they got out?

A. Well, of course, some less than others I suppose.

Q. I believe that is all we have to ask.

The Court: Anything further from this witness? Come down, Mr. Crockett.

The Court: Call the next one.

[fol. 967] Mrs. George W. Forehand, called as a witness on behalf of the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maddin:

Q. What is your name?

A. Mrs. George W. Forehand.

Q. On Sunday, October 21, 1962, did you have occasion to have lunch at a downtown restaurant?

A. Yes, sir, I did.

Q. What restaurant was that, Mrs. Forehand?

A. B & W Cafeteria.

Q. From what direction did you approach the B & W?

A. The north.

Q. On 6th Avenue?

A. That's right.

Q. As you approached it, did you see any persons also approaching the restaurant?

A. Yes, I did.

Q. Will you describe them?

A. A group of colored people—men.

Q. They pass you? Or stay behind?

A. Yes. They passed me, advancing to the B & W Cafe-
[fol. 968] teria.

Q. You were coming from the north?

A. That's right.

Q. You mean you were coming from Union Street toward the restaurant?

A. That's right.

Q. And as they passed you, well, first of all, where did they go? After they passed you?

A. They entered the vestibule of the B & W Cafeteria.

Q. How far were you from the entrance when they entered?

A. Approximately 25 feet.

Q. Then where did you go?

A. To the B & W.

Q. Were they there?

A. They were there inside the first door. There are two doors.

Q. Had they gained admission beyond that first door?

A. Yes, they did.

Q. Had they gotten past the second door?

A. No, they were blocked at the second door.

Q. Were there others in your company?

[fol. 969] A. Yes, there were. My mother and father.

Q. Now, did you overhear any conversations that may have passed between them?

A. Yes. I don't know which one said it, but one said, When you get there—

Mr. Williams: We object, if your Honor please, to that as incompetent.

The Court: Well, yes, unless she can identify it as having come from one of the defendants.

Mr. Maddin: Did it come from one of the defendants—Well, first of all, did the ones that passed you—are they the ones you are talking about?

A. That's right.

Q. How many passed you?

A. Approximately 7, 8, or 10.

Q. Now, did you seek to identify the speaker at the time?

A. No, I did not.

Q. Was the speaker one of the ones that went into this vestibule?

A. That's correct.

Q. One of the ones that went into the vestibule and were taken by the police away from there?

A. Yes.

Mr. Williams: We object to that, if your Honor please. [fol. 970] The Court: No. That is competent, gentlemen. That has been shown—there is proof of that in the record. She may admit that.

Mr. Williams: We object, if your Honor please, not only to the competency of it, but also on the ground that Counsel is leading the witness.

The Court: Well, now, don't lead the witness.

Mr. Maddin: All right.

The Court: Don't do that.

Mr. Maddin: Mrs. Forehand, you have testified that some 8 or 10 colored boys went into the vestibule?

A. Yes.

Q. Do you know what happened to them?

A. Do I know what happened? When?

Q. After they entered the vestibule?

A. They were gathered together in a group inside the vestibule.

Q. Did they remain there as long as you did, or do you know how they departed?

A. They departed by truck, or the wagon, I don't know.

Q. By patrol wagon? Of the police department?

A. That's right.

Q. Are you in a position to know whether or not they [fol. 971] all remained there until the patrol wagon took them away?

A. They remained where?

Q. In the vestibule.

A. Until the patrol wagon took them?

Q. Until the patrol wagon took them?

A. That's right, I believe.

Q. Now, I'll ask you if—I asked you a moment ago if the one was one of the ones that went into that vestibule and was taken away by the police?

A. That's correct.

Q. All right. Will you state what was said?

A. When we get there, just keep pushing. Do not stop. Just keep on pushing.

Q. Now, let me see if I understand you. Repeat the whole thing. I am not sure I understand it.

A. When we get there, just keep pushing. Don't stop. Just keep pushing.

Q. And that was said by one of the colored boys who went into this vestibule?

Mr. Williams: We object to that, if your Honor please.

The Court: Overruled.

Mr. Williams: On what ground, if your Honor please.

[fol. 972] The Court: I overruled your objection. I thought he might be leading a little bit, leading the witness a little bit.

Mr. Williams: If your Honor please, we say he is leading and it is incompetent.

The Court: I think that is competent and I will have to allow the witness to answer it.

Mr. Maddin: What response to that did you hear?

A. Not any.

Q. And where were you in relation to the vestibule of the cafeteria when you heard that? When you heard that statement made?

A. Advancing to the B & W.

Q. Can you estimate your distance from the vestibule when you heard it—distance from the entrance way?

A. I don't think so. Maybe 15 feet or 20 feet.

Q. I see, and were the persons in that group within your sight at all times until they got into the vestibule?

A. That's correct.

Q. Now, then, did you, after reaching the doorway to the restaurant, ultimately gain admission to the restaurant?

A. That's correct.

Q. What happened to you and the persons in your [fol. 973] party who were trying to gain entrance—to get through—

A. Ask that again, please.

Q. What occurred to you or the persons with you while you sought to get through into the restaurant?

A. Mother—

Mr. Williams: We object to that, if your Honor please, as being leading and suggestive, and—

The Court: Well, he just asked her, did he not—just what you observed and saw there, ma'am? You can tell that.

A. When we entered the vestibule, or when we attempted to enter the vestibule, this group was grouped together. My mother feared for her life to go in there.

The Court: Well—of course, I don't believe you would know about that.

Mr. Williams: We object, if your Honor please.

The Court: So you just tell what you observed and saw, ma'am.

A. Well, the group was grouped together. And I asked them to excuse me and I'd get by. They were gathered near the door. I tried time and time again to get through the inner door, and after trying for maybe 5 or 10 minutes, we got through a very small crack in the door.

Q. What, if any, assistance did you have, or render anyone else in getting through the door?

A. Uh—we did decide to go in, as I started to say a while ago, after mother said she was afraid—

[fol. 974] The Court: No—no—no—that's—what mother said, you can't say. He just asked you the question and I admonish you again—just watch—just what you saw there that happened, and observed.

Mr. Maddin: As you started in, now I want you to tell me what assistance you gave or received, in your effort to get through.

A. I took my mother, and put her in front of me. Held on to the bar with my left hand, put my right hand around her, so she could gain entrance. I did my father the same way, and I entered through a very small crack in the door.

Q. That's all. You may cross examine.

Cross examination.

By Mr. Williams:

Q. Mrs. George W. Forehand?

A. (hesitates)

Q. Ma'am?
A. (hesitates)
Q. Is that your name?
A. That is correct.
Q. Mrs. Forehand, I gather this morning that you went into the place before—well, let's put it another way. You were at the place while some other people were in the [fol. 975] vestibule? Is that correct?
A. That's correct.
Q. And you say these Negro men went into the vestibule?
A. That's correct.
Q. And you say you brought your mother through, and then your father—you brought them through separately or did your father come behind you? Or how?
A. I think my father came after mother and I, but they went in before I did.
Q. Well, you didn't carry your father through any great dangerous situation as you have been telling the jury here?
A. I carried him through a group.
Q. You carried him through a group of people?
A. That's right.
Q. And of course that group of people that you carried him through had done nothing to you?
A. That's right, they had.
Q. Well, what had they done to you?
A. They embarrassed me and humiliated me.
Q. All right.
A. That's right.
[fol. 976] Q. They embarrassed you and humiliated you because they were Negroes? Is that correct?
A. No, because they called me a hypocrite.
Q. Because they called you a hypocrite?
A. That is correct.
Q. You didn't feel that you were?
A. I certainly didn't.
Q. Well, when was it that you were called a hypocrite?
A. In the vestibule when I attempted to go through.
Q. Who called you a hypocrite?
A. The gentleman sitting next to you.
Q. The gentleman sitting next to me called you a hypocrite?

A. That is right. Not just me, but all the people in there.

Q. All the people in there? How many people were there in the vestibule? All the white people in the vestibule?

A. No, I am talking about in the restaurant.

Q. You are?

A. Yes.

Q. State what the gentleman said that called you a hypo-
[fol. 977] crite?

A. He said, Look at them—sitting in there, supposing to be Christians, just come from church, but they are just a bunch of hypocrites.

Q. Now, then, that is what you construed as being called a hypocrite?

A. That's correct.

Q. You weren't sitting in there at the time, were you, Mrs. Forehand?

A. No.

Q. So you were just trying to get in there to join the group that he was calling hypocrites? Is that correct?

A. That is correct.

Q. So that he did not actually call you a hypocrite,—he just called some other people hypocrites—and you wanted to join that group? Isn't that correct?

A. No. That is not correct.

Q. So that is the only thing that happened to you going through the vestibule? Isn't it?

A. No. Pushing and shoving.

Q. Well, you were—have you ever been to any public place where there was a crowd, Mrs. Forehand?

A. Of course.

Q. You have been to the city auditorium sometimes—
[fol. 978] don't you at times have to push and elbow your way through a crowd?

A. I don't think a gentleman would.

Q. You don't think a gentleman would have to push his way—push and elbow his way through a crowd?

A. Not of ladies, no.

Q. You think that in any crowd that a gentleman ought to stand back and allow any ladies to pass through?

A. That's correct.

Q. Well, as a matter of fact, that thing you were ob-

jecting to was having to pass through this group of Negroes to get into the restaurant? That is what you were voicing this objection to, wasn't it?

A. No, I did not.

Q. You did not?

A. I objected to them—to being insulted and having to push my way or try to gain entrance through this.

Q. Well, what I am saying is—you don't object—when you go up in the B & W—to go up at the B & W Cafeteria and there is a crowd of white people in there—you don't object to elbowing your way through the crowd, do you?

A. I certainly would object to it.

Q. You would?

A. Elbowing or pushing.

[fol. 979] Q. Well, you were the one doing the elbowing and pushing to get through the crowd, weren't you?

A. No. I was begging them—their pardon to get my way through the crowd.

Q. You were begging their pardon?

A. Yes.

Q. Well, now, where were you standing in the vestibule, Mrs. Forehand?

A. Well, I started in at the first entrance, but—

Q. All right. You got inside of the vestibule?

A. That's right.

Q. So that these Negroes were not just packed in there like sardines?

A. Just about.

Q. Ma'am?

A. Just about.

Q. Well, how did you get the door open then?

A. I just told you I went in through a very small crack.

Q. I'm talking about the outside door?

[fol. 980] A. No. There's no trouble getting in the outside door.

Q. There was room for the outside door to open then?

A. You see, approximately 7 or 10 people in this group—

Q. Yes?

A. And that wouldn't jam this vestibule to the capacity where it wouldn't, for instance, contain one more.

Q. So there was plenty of room for you to get into that vestibule?

A. Not all the way through. Maybe just inside the first door.

Q. But when you got to the second door, why these gentlemen—and let's call them Negro gentlemen, do you mind?—

Mr. Maddin: If your Honor please,—

Mr. Williams: —these gentlemen—

Mr. Maddin: I don't think he has the privilege of instructing the witness, about what to call the defendants.

The Court: Go ahead and call them—

Mr. Williams: He was allowed to call my race whatever he wanted to call them, if your Honor please.

Mr. Robinson: Let's back up right this minute, if your Honor please.

The Court: No, gentlemen, go ahead with your examina-
[fol. 981] tion. Go ahead with your examination, now.

Mr. Williams: And these Negro gentlemen were standing at the door, trying to get in the restaurant?

A. Yes.

Q. And the doorman was blocking them out? There? Was he not?

A. I don't think so. No, I got in. No, he wasn't blocking them out.

Q. Do you mean the doors were open?

A. I got in.

Q. Yes, but the doors—you said you went through a small crack, didn't you?

A. Yes.

Q. These are swinging doors. Are they not, Mrs. Forehand?

A. Yes, they are.

Q. So that there had to be somebody on the inside pushing on the door to keep it shut, otherwise these gentlemen could have—if these are the gentlemen—could have entered? Without any difficulty? Couldn't they?

A. I suppose so.

Q. Of course. As a matter of fact, the doorman was

there, keeping these Negroes—Negro persons out of the restaurant?

A. Well, they kept me out. I don't know about him. You [fol. 982] will have to question him about that.

Q. Well, now, Mrs. Forehand, the doorman was the one holding the door, wasn't he?

A. Actually, I couldn't see whether he was holding the door, or not, until I got there, and put my mother inside.

Q. Well, when you put your mother inside, you did see the doorman there holding the door, did you not?

A. The door was opened for her when she got there.

Q. Yes, but the doors opened—did they open wide?

A. I just don't know how wide.

Q. I thought you said you got in through a little crack.

A. That's exactly right, but I don't know how wide it—

Q. He did not open it wide?

A. Yes, big enough for me to get in.

Q. Just a little crack. It wasn't too much? That's true, isn't it, Mrs. Forehand?

A. It was a crack big enough for me to get in.

Q. Yes, ma'am? As a matter of fact, the doorman was [fol. 983] there holding them out, and you all were let in through a small aperture?

A. We gained entrance.

Q. By the doorway?

A. Yes.

Q. By the doorman?

A. We gained entrance through the door, I don't know whether it was by the doorman, or not.

Q. Mrs. Forehand, are you saying that you never saw the doorman there?

A. Of course, I have seen him there.

Q. No, I mean on that afternoon?

A. Yes, I saw him.

Q. The doorman was there, was he not?

A. He is always there.

Q. Mrs. Forehand, on this particular occasion, the doorman was there, was he not?

A. Yes.

Q. And he was holding the door to keep these Negro persons out, was he not?

A. I said that I couldn't see for this crowd there, but when I got there with my mother, the door was opened for us.

Q. Yes, ma'am. And when you got in, didn't you see the doorman?

A. Yes. Uh-huh.

[fol. 984] Q. Didn't you see him holding the other door in order to let you and your mother in through a crack?

A. He was standing on the door.

Q. And he was holding the door, was he not, Mrs. Forehand?

A. He always holds onto the door.

Q. You just—you don't know whether he was holding the door, or not?

A. I didn't see him force—but he always hold onto the door every day.

Q. You didn't what—you didn't look at him to see if he was holding the door?

A. No, I didn't.

Q. Your father had got in ahead of you, hadn't he?

A. He got in. But—no, mother and I went in first, then he came in, but I put both them inside before I came in.

Q. Do you know Mr. J. Vaulx Crockett, Mrs. Forehand?

A. Who?

Q. Mr. J. Vaulx Crockett?

A. No, I don't.

Q. Mrs. Forehand, do you know of anybody there—of any white person who tried to get in to that restaurant, [fol. 985] and did not?

A. Yes. There are about 30 or 35 people from our church who eat there every Sunday. This particular Sunday, some of these people did not gain entrance.

Q. I am asking you, Mrs. Forehand, if you can give me the name of any person that tried to get in that restaurant, and was unable to?

A. Uh— Not off-hand.

Q. And, as a matter of fact, if you had known, you would have gotten their names for the attorney general so fast it wouldn't have been funny.

A. I think you are testifying for me there.

Q. All right. Well, I will ask you another way. If you had known some person who was excluded—some white person—who tried to get in and couldn't—you would have told the Attorney General about it, wouldn't you?

A. I am sure I could find someone right now from my church that didn't.

Q. But you haven't tried?

A. No, I haven't.

Q. You haven't discussed that with the attorney general?

A. No, I have not.

Q. How many times have you discussed that with the [fol. 986] attorney, John Maddin?

A. Oh, he called me last Monday or Tuesday morning, and—uh, maybe one other time.

Q. You have gone over the whole case with him?

A. Oh, no. No. The first time I talked with him was about my being sick and being doubtful about coming up here.

Q. Well, how did he know that you had been—that you were up there that time?

A. My father had talked with Mr. Carrier.

Q. Is your father up here today?

A. Yes, he is.

Q. Your mother up here today?

A. No, she isn't.

Q. Now, Mrs. Forehand, you said you were coming from Union Street, going towards Church,—and you had been at this place, and these youngsters passed you?

And your mother and your father?

A. Correct.

Q. Were you noticing them particularly as they passed you?

A. No. Not particularly.

Q. Well, what made you notice these Negroes, Mrs. Forehand?

[fol. 987] A. Just like I would notice anybody that would make a remark about pushing or shoving. I wondered what was going to take place.

Q. Well, where you at the time you heard this remark made?

A. I said while ago, I think, it was about 25 feet from the entrance of the B & W Cafeteria.

Q. They were about 20 feet from the entrance?

A. Approximately.

Q. And where were you?

A. When I first saw them, about 25 ft.

Q. When you heard the remark, where were you?

A. About 20 to 25 feet from the entrance of the B & W Cafeteria.

Q. You mean you were right up close to them?

A. Passing. They were passing, passing me.

Q. They were passing you?

A. That is correct.

Q. Where were you walking? Were you walking between your father and mother? Or—

A. I don't remember.

Q. You don't remember?

A. No, I don't.

[fol. 988] Q. Were there any other people on the street? Anywhere?

A. Of course. Always.

Q. Ma'am?

A. There's always people on the sidewalk on 6th Avenue, on Sunday.

Q. Well, you mean by that that there were on this occasion people—

A. Other people—

Q. Other people on the sidewalk—passing on the sidewalk, up and down?

A. That is right.

Q. And how did you know that that remark came from this group of young men?

A. Well, my hearing is perfectly good.

Q. Well, then—

A. My sense of direction is good.

Q. Do you remember these Negroes?

A. I certainly do.

Q. Do you remember their face?

A. I certainly remember two of 'em's face.

Q. Two of 'em's face.

A. I certainly do.

Q. Well, why can't you remember which one the remark came from then?

A. The remark came, and I heard it, and when I heard [fol. 989] it, I turned around and saw this group—

Q. Right?

A. And I did not look them in the eyes—

Q. Right! Mrs. Forehand, you weren't even looking at them when you heard the remark,—at the time you heard the remark, were you?

A. Well, I could close my eyes and hear you talk.

Q. Mrs. Forehand, answer my question. Your answer to that one question is directly unresponsive.

You weren't even looking at them—at these Negroes—at the time you heard this remark, were you?

A. I still heard them.

Q. But it is true you were not looking at them?

A. That is correct. I am not looking at you, but I can hear you.

Q. You heard a remark, and you looked around and you saw the Negroes, and it was assumed that the remark came from that group? That's true, isn't it?

A. I did not—

Q. Isn't it true, Mrs. Forehand?

A. I did not assume it.

[fol. 990] Q. Isn't it true?

A. I did not assume it.

Mr. Maddin: I heard her answer.

Mr. Williams: Isn't it true, Mrs. Forehand?

A. I did not assume it. I can hear you talking from that direction. I know it is you.

Q. Yes? And you assumed it came from this group because you—you—in your opinion, it came from that direction? Is that right?

A. (Hesitates.)

Q. Is that right, Mrs. Forehand?

A. It came from them.

Q. Mrs. Forehand, you are still insisting on testifying of your own knowledge that it came from them, aren't you?

A. That's correct. I know it did.

Q. And—yet—you admit that you weren't even looking at them at the time that you heard it?

A. I know it came from there.

Q. Now, Mrs. Forehand, I will ask you if all of your testimony here has been given for the same kind of assumption that you have made with regard to that testimony? Do you habitually do that? —assume things?

Mr. Maddin: If the Court please, the question is too general to be answered, if you want to answer it.

[fol. 991] The Court: Gentlemen, that is for the jury to determine. They will weigh that. Members of the Jury, you try the facts. You will determine the weight and the credibility that will be given to every witness.

Mr. Williams: That's all. Thank you.

Redirect examination.

By Mr. Maddin:

Q. Keep your seat, Mrs. Forehand. Mrs. Forehand, when you overheard the remark, was any person other than what you described as where you considered to be the source of the expression, was any other person between you and what you considered to be the source of the expression?

A. You mean did anybody else hear this remark?

Q. No. Was anybody passing in between you, or was any person in between you and this group of Negroes whom you have described?

A. No, there was not.

Q. Now, a moment ago you identified one that made a remark in the vestibule. I will ask you to identify him in regard to him and his lawyer. Where is he sitting?

A. Next to the lawyer.

Q. (Points to one.) Is that the one I am pointing at here?

[fol. 992] A. That's correct.

Q. Let the court record reflect that he is the same one who has been previously identified as defendant #4.

The Court: I think that's right.

Mr. Maddin: Who—I have not asked yet, but I ask the Court to call upon him to state his name.

Mr. Williams: We respectfully submit that he can not be required to state his name.

The Court: He don't have to, but let the record show that it's—that he will be referred to as defendant #4.

Mr. Maddin: That's all. Thank you, Mrs. Forehand.

The Court: Call the next.

GOLDEN CORNELIUS ALLEY, called as a witness on behalf of the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Maddin:

Q. Will you state your full name?

A. Golden Cornelius Alley.

[fol. 993] Q. Mr. Alley, on October 21, 1962, did you seek to have lunch, or dinner, at a downtown restaurant?

A. Yes, sir.

Q. What restaurant?

A. B & W Cafeteria.

Q. In whose company did you go to that restaurant?

A. My wife and daughter.

Q. From what direction did you approach the restaurant?

A. Well, from Union Street. We parked our car—I don't know exactly whereabouts, but toward Union Street. We came from Union Street.

Q. I see. You walked from Union Street down 6th Avenue to the restaurant?

A. Well, no. We didn't park on Union. We was coming from the direction of Union. We parked our car about half a store length up above that.

Q. And you walked down 6th Avenue from Union Street to the restaurant?

A. Yes, sir. 6th Avenue.

Q. Now, then, as you approached the restaurant, did you observe any other persons, or groups of persons entering the restaurant?

A. As we approached the restaurant, a group of colored [fol. 994] boys passed my wife and I, and as they passed, they said, When we start in, keep a-pushin'.

Mr. Williams: Well, we object to that, if the Court please.

The Court: Well, don't get to it too quickly.

Mr. Maddin: Where were they going?

The Court: The lawyer will ask you.

A. Sir?

Mr. Maddin: After they passed you, where did they go?

A. B & W Cafeteria.

Q. Approximately how many of them were there of them?

A. I would judge about 8 or 9.

Q. And they entered the restaurant, so far as you could see?

A. Yes, sir.

Q. When you reached the entrance to the restaurant, where were they?

A. On the inside.

Q. Had they reached the restaurant proper, or only the vestibule?

A. Well, now, that's what I said awhile ago. They passed us.

Q. Mr. Alley, this score on this line of questioning here, [fol. 995] we will come back to it, whatever it is. After they passed you and went through the first set of doors, you went through then on up to the doors yourself?

A. My wife and daughter did, and I followed.

Q. You followed?

A. Yes, sir.

Q. When you got through the first set of swinging doors at the B & W, where were these boys?

A. There on the inside.

Q. Were the men in the restaurant or the vestibule?

A. The vestibule.

Q. Now, then, are these the same ones that passed you?

A. Yes, sir.

Q. And made a remark?

A. Yes, sir.

Q. Do you know what ultimately happened to those boys in the vestibule? Where did they go?

A. Well, they just stayed in there and milled around.

Q. They just stayed in there and milled around—did you see them leave after a bit?

[fol. 996] A. I seen 'em, yes. The police got 'em.

Q. How did they go? How did they leave?

A. They carried them in the patrol.

Q. In the custody of the police?

A. Yes, sir.

Q. The same ones that were in there?

A. Yes, sir.

Q. The same ones that passed you?

A. Yes, sir.

Q. What did they say when they passed you?

A. That's at the beginning of this, now?

Q. Yes.

A. Said, "When we start in, keep a-goin' just push 'em on."

Q. All right, sir. Now, when you got to the restaurant yourself, and tried to pass through, into the restaurant proper, did you wait outside the restaurant for any period of time, or did you attempt to go in?

A. Well, now, I'd say about 10 seconds, possibly. My wife and daughter went in, and I was there about—started in, and I was there about 10 seconds, I guess, behind them. Then I come on in.

Q. And what happened to you, while you were in this [fol. 997] restaurant? If anything unusual?

A. Well, they were still a-blocking the entrance to the—

Q. I asked you what happened to you. Did you walk freely through there?

A. Oh, no.

Q. Without any interruption, or did you not?

Mr. Williams: I object to him leading, if your Honor please.

The Court: Don't lead him. (To the witness.) He asked you what happened to you while you were in the vestibule, if anything?

A. Well, it was blocked, and I couldn't get through the door.

Mr. Maddin: All right, sir.. How did you get through the door?

A. Well, Mr. Williams, that doorman, I think, assisted —helped us get through.

Q. Did anybody exert any unusual efforts? If so, tell what they were.

A. Well, they was pushing and shoving.

Q. Who was?

A. These boys here. There was no bad language used.

Q. Do you recognize any of them specifically?

[fol. 998] A. Yes, sir.

Q. Which one?

A. That fellow down there? (Points.)

Q. Begin counting from this position here, and tell me which one.

A. The one next to the lawyer there, and the next one to him.

Q. Count from him, Mr. Alley. Would this be #1?

A. Yes, sir, that's #1. The second one then would be— the third one then would be #2,—the third one, then, would be #3.

Q. Wait just a minute. Do you recognize this one sitting in the first chair?

A. Yes, sir.

Q. How about this one? Was he there?

A. Yes, sir.

Q. What about this one in the second chair?

A. I don't recognize him.

Q. Well, now in the third chair?

Mr. Williams: I object, if your Honor please. It is against—violating the defendants' constitutional rights.

Mr. Butler: The only way we can do it! We have tried [fol. 999] to get the names—

The Court: No. No. They—

Mr. Williams: They don't have to name themselves, if your Honor please.

The Court: I understand. But the witness has a right to point them out. That's what he's trying to do.

Mr. Williams: May your Honor please, he's not. Counsel is down here pointing at them.

The Court: Overrule your objection. Proceed.

Mr. Maddin: If your Honor please, I am not trying to point them out.

Mr. Williams: Let the record show that Counsel has been allowed to stand here and point to one of them and say, Is that one of them? Is that one of them? Is that one of them?

The Court: No, sir.

Mr. Williams: The customary way is to ask a man if he knows a man in this courtroom, and if he wants to identify him to come down here and point them out, and identify him.

The Court: All right, sir. He may point them out but we can not use anything except numbers to identify them, and let the record show that if you like, Mr. Witness, you may walk down there and point your finger at any man you identify.

Mr. Maddin: To start with—

The Court: No—no—no—just let him pick them out.

A. This one.

[fol. 1000] Mr. Maddin: All right, sir. And let the record show that he—

The Court: Now, wait a minute, wait a minute! Now, let the record show that the witness is pointing at what the Court denominates as defendant #1.

(The witness points again.)

The Court: Now, let the record show that the witness points at what the Court denominates as defendant #3.

The Court: Now, now, what did he do next?

Mr. Maddin: He pointed at the man sitting immediately to—

The Court: Let him do it again. The third man, if he did. Point again to the third man, if you did.

(The witness points.)

The Court: Now, let the record show that he points at the man sitting on the immediate right of Mr. Williams who has been, I think, identified as defendant #4, at one time.

Mr. Madden: All right, Mr. Alley, now, are there any others?

A. No, sir.

Q. Return to the witness chair. You may cross examine.

Cross examination.

By Mr. Looby:

Q. Mr. Alley, I believe you said when you got to the [fol. 1001] entrance, it was blocked and there were some other people who were trying to get in?

A. How is that?

Q. When you got to the entrance of the restaurant, it was blocked. You tried to go in, didn't you?

A. Yes, sir.

Q. What prevented you from going in?

A. What did I do what?

Q. What kept you from going in?

A. When we started in these boys were in the way.

Q. You daughter and your wife got in, didn't they?

A. Well, they—no, they didn't get inside the restaurant, they got inside the vestibule.

Q. Well, did they go in the restaurant?

A. They did—they finally got in.

Q. Well, they finally got in—how did they get in?

A. How did they get in?

Q. Yes?

A. We's assisted in.

Q. Who assisted them?

A. The doorman.

Q. What was the doorman doing when you got there?

[fol. 1002] A. He was holding the door, keeping them from getting inside.

Q. And what was keeping these colored men from getting inside? And had the colored men got inside, you would have gotten in freely, wouldn't you?

A. How is that?

Q. Had the colored men got inside, you could have gone in freely, couldn't you?

A. (To Court.) What did he say?

The Court: He said had the colored men gotten inside, you would have gone in there freely, wouldn't you?

A. If they had a-gotten in there?

The Court: That's the way I understood his question.

A. Yeah, if there hadn't been no blocking there, I could a-got in free.

Q. So it was the doorman that was doing the blocking, then, wasn't it?

A. No, the doorman wasn't doing the blocking. It was them inside that was doing the pushing and the blocking.

Q. Well, the doorman was blocking them, wasn't he?

A. Yeah, he was blocking them when they started to get [fol. 1003] through, he would.

Q. The doorman was blocking them, keeping them from getting in, wasn't he?

A. He was doing all he could do to keep them from it.

Q. Yes, sir? And they were in front of you?

A. Sir?

Q. They were in front of you?

A. They was in front of me?

Q. Yes?

A. Who?

By the Court:

Q. The Negroes.

A. Well, they was all inside there. Yeah, they was in front and on the side, too.

Mr. Looby: And if the doorman had let them in, there would have been nothing to keep you from going in?

A. No, if the doorman had got in, why they wouldn't a-been in the way, if they hadn't been there.

Q. That's right. So the doorman was blocking them, and wouldn't let them in, and they were in front of you, and that was keeping you from getting in freely?

A. Well, I don't know about that.

Q. How did you get in?

A. I went in with my wife and daughter.

[fol. 1004] Q. Well, your wife and daughter got in all right?

A. I went in right behind 'm, about 4 or 5 or 10 seconds behind them.

Q. So they didn't block you? Then?

A. Oh, yes, they was all there—

Q. You went in right after your wife and daughter?

A. My daughter—she put her hand on the side of the door, and told her mother to go in, and I followed her mother in.

Q. Didn't the doorman open the door for your wife and daughter?

A. Yeah.

Q. You are talking with your head now.

The Court: He said, Yes.

Mr. Looby:

Q. Now, after your wife and daughter went in, you went in after them?

A. How was that?

(Reporter repeats.)

A. Went right in behind them.

Q. Now, did your daughter put her hand on the door to keep the Negroes out?

A. She put her hand up against the door, like that. (Demonstrates.)

Q. To keep the Negroes out?

A. No, she put her hand up on the door so I could get [fol. 1005] by.

Q. I see. And that was keeping the Negroes out too, wasn't it?

A. Well, I don't think it kept them out, the way they was pushing.

Q. Well, they didn't get in, did they?

A. Well, I don't know about that.

Q. You were there, weren't you?

A. Sure, I was there.

Q. Well, you know whether they got in or not, don't you?

A. I don't think I—she ain't no football player. No, I don't think she could a-kept these men out.

Q. Now, these Negroes—were they allowed to go into the cafeteria?

A. She assisted us then, my daughter did.

Q. She assisted you?

A. She assisted us.

Q. But I am talking about where these Negroes allowed to get in the cafeteria?

A. Were they what?

Q. Were these Negroes allowed to get in the cafeteria?

A. No, sir.

[fol. 1006] Q. Well, who kept them from going?

A. Well, the manager of the place—and the man there at the door, I guess.

Q. Who was the manager?

A. Well, I believe they say his name is Mr. Carrier.

Q. And Mr. Carrier kept them from going in there?

A. He assisted.

Q. With the assistance of the doorman?

A. Yes.

Q. And with the assistance of your daughter?

A. Of—my daughter?

Q. Yes?

A. And how would that—I don't think my daughter would apply to that much, because she is—

Q. When did you see any of those boys again?

A. When did I see 'em?

Q. Yes.

A. Since I have been up here.

Q. No. Since October 21st?

A. I never have seen 'em until we come to court.

[fol. 1007] Q. Have you seen them since they have been in court, since you have been here?

A. Yes.

Q. You have seen these fellows?

A. Yeah.

Q. Talked to some of them?

A. Out there in the hall. They walked up and commenced talking to me.

Q. And is that the way you identify them?

A. Oh, no.

Q. You identify only those that talked to you?

A. No. I really don't know which ones talked to me.

Q. How many of them talked to you?

A. Well, I don't think it was but a couple, 2 or 3, but there's about 6 or 7 there, now. I don't know which one's doing it.

Q. But 2 or 3 talked to you?

A. Sir?

Q. But 2 or 3 talked to you of this?

A. So he had talked to?

Q. 2 or 3 talked to you?

A. Yeah, 2 or 3.

[fol. 1008] Q. Talked to you out in the hall?

A. That's right.

Q. Are those 2 or 3 among those whom you are now identifying?

A. Well, there was—there's two or three there. I identified them three, yes.

Q. That talked to you out in the hall?

A. Yeah.

Q. If they had not talked to you, you would not have been able to identify them, would you?

A. How is that?

Q. If they had not talked to you, outside here in the hall today, you would not have been able to have identified them, would you?

A. Oh, yes, sir. Yes, sir-r-ee.

Q. You would have?

A. Yes, sir.

Q. By what now, would you have been able to identify them?

A. By what?

Q. By what would you have identified them?

A. Well, I know by their actions up there and the way that they were pushing around.

Q. Now, even if they were to mix up with other colored [fol. 1009] people back there, you could go back there and identify them?

A. I didn't understand the question.

The Court: He said if they mix up with those colored people back in the courtroom, could you go back there and identify them?

A. Yes, sir.

Q. You could?

A. Yes, sir.

Q. Mr. Alley, you don't hear me very well? Or don't you understand me?

A. Well, I don't understand you. Mostly, I just can't understand you.

Q. Do you hear me?

A. Pretty well.

Q. And when they—these boys—were going down the street, they were talking?

A. Yes.

Q. How close were you to them?

A. Right up against them. Just passed right by up against me.

Q. Can you repeat now everything they said, after 4 months?

A. (The Court has to repeat.) I think I can because it wasn't but a few words.

The Court: Am I doing a creditable job of—

[fol. 1010] Mr. Looby: Sir?

The Court: Am I doing a creditable job of repeating your questions?

Mr. Looby: You are doing a pretty good job, Judge. I suggested yesterday that I would use an interpreter.

The Court: All right. I know, but I didn't take to that. All right, now.

Mr. Looby: Mr. Alley, when you went in, you got served?

A. Sir?

Q. When you went in, you got served?

A. Yes, sir, I sure did.

Q. They served all the white people that came in there, didn't they?

A. Sir?

Q. They served all the white people that came in there, didn't they?

A. No. I don't think so. Some of 'em left. I know they didn't.

Q. Didn't get served?

A. Didn't get served. They left.

Q. Do you know how many did?

A. No, sir, I couldn't tell you.

Q. Well, they were ready and willing to serve them,

[fol. 1011] weren't they?

A. Yes, but I think they just wanted to get out of there.

Q. Are you a member of the Downtown Presbyterian Church?

A. Sir?

Q. Are you a member of the Downtown Presbyterian Church?

A. No, sir, I am a member of the Nazarene Church, First Nazarene Church, 5th and Woodland.

Q. When you got to the restaurant, you got there about the same time? You and the colored boys did?

A. Yeah. About the same time. They beat us by a little bit.

Q. Was anybody standing on the outside then?

A. Yes, sir, looked like there might be a—well, I won't say how many, but a few standing on the outside.

Q. Just give me a rough estimate?

A. 3 and 4.

Q. About 3 or 4? Where were they standing? Do you know?

A. Near the door.

Q. Why were they standing there?

A. I don't know.

Q. Well, there wasn't anything to keep them from going [fol. 1012] in, was there?

A. (Hesitates.)

Q. Was there anything keeping them from going in?

A. Well, I don't think there was. They may have been talking.

Q. They may have just been talking.

A. They may have been just talking.

Q. It was a warm, pleasant day?

A. Well, I don't think it was too bad.

Q. It was pleasant enough to stand on the outside, talking?

A. I—

Q. The weather was—

A. I wasn't cold.

Q. Was the weather good enough to stand outside talking?

A. Sir?

The Court: (Repeats for the benefit of the witness.)

A. Well, I disremember that.

Q. Were you there when the police was called?

A. I was there when the policeman was called?

[fol. 1013] Q. Yes?

A. I was inside then.

Q. You were being served at the time?

A. Yes, sir.

Q. And everybody that came in to be served could have been served, or were being served?

A. Everybody that could be served?

Q. Yes, sir?

A. If they had all eaten, they could.

Q. And these 7 or 8 colored men that you saw come into the restaurant?

A. Yes, sir.

Q. If they had come in they could have been served, couldn't they?

A. Yes. Plenty food there.

Q. Then their admission would have been an increase in trade, wouldn't it?

Mr. Maddin: We object to that. It calls for a conclusion.

The Court: And argumentative.

Mr. Looby: Did your Honor rule on that?

The Court: I say, I rather think your question is argumentative, and shouldn't be asked.

Mr. Looby: Well, he was there, and they asked to be served.

The Court: Well, let the jury determine about that.

[fol. 1014] Mr. Looby: But if they had come in to be served?

The Court: We'll let the jury determine that.

Mr. Looby: Will your Honor let him answer?

The Court: He may state that, but I think we will let the jury conclude about that.

Mr. Looby: Will your Honor permit him to answer?

The Court: Not whether there would have been increasing trade, or not. You may ask him if they could have been served, or if they had been served, if you haven't and I think you have.

Mr. Looby: But if they had abeen allowed to come in, they could have been served, couldn't they?

A. Yes, sir.

Q. You say the manager let you and your daughter and your wife in?

A. Well, I don't know whether it's the manager or the doorkeeper—

Q. How many of them assisted your daughter and wife to get in—one or two?

A. I don't know. I couldn't say, really, there was so much pushing and crowding, I couldn't tell you.

Q. You were right beh nd them, weren't you?

A. Yes, sir. No, I wasn't behind them. I was behind my wife.

[fol. 1015] Q. Well, now, didn't the manager and the doorman help your wife any?

A. Well, I—I think they cracked the door, for them to get in.

Q. And then they closed the door after they got in?

A. After I got in.

Q. And all they were doing, really, was keeping these Negroes out, wasn't it? Was that what the doorman was trying to do?

A. He was keeping them out.

Q. Thank you.

The Court: You may come down, Mr. Alley.

Redirect examination.

By Mr. Maddin:

Q. Are you familiar with the location of the menu in the big glass case out in front of the restaurant?

A. Yes, sir.

Q. Come down.

(Recess 2:40 o'clock P.M.) (Later adjournment announced.)

Fifth Day

March 9, 1963

Mr. Looby: If your Honor please, I presume I have one formal matter and I shall state what it is. When Owen Smith testified yesterday, there were certain warrants introduced—with some attachments as Collective exhibit [fol. 1016] #1, and Collective exhibit #2, up to Collective exhibit #8. Now, in Cross Examination, we brought out certain matters and the arrest slip was referred to. I think that was the last one, and Mr. Smith testified that he made out those particular exhibits at the time the defendants were booked. Now, the arrest slip was mentioned as the fourth piece of paper, in the collection and we had him identify that.

Now, I should like to have that 1a, 2b, etc. so that they can be identified by anyone pursuing the record.

The Court: Well, I see no objection to that. I take it there are none? All right.

Just how do you suggest then that the Court Reporter mark them?

Mr. Looby: Exhibit #1—Collective Exhibit #1—it will be 1a, and the next one 2b, on—just to keep them separate. That is the booking slip.

The Court: Well, I take it there is no objection to it being marked so that they can be properly identified, so let it be done, since there is no objection.

Mr. Looby: That is all I wanted to say.

The Court: Bring down the jury.

(The jury is brought in and polled.)

The Court: The jurors are all present. You may call the next witness for the state.

[fol. 1017] JOHNNY CLAIBORN, called as a witness for the state, being duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. What is your full name?
A. Johnny Claiborn.
Q. Where do you work?
A. Nashville City Police Department.
Q. How long have you been in the department?
A. About 8 years.
Q. On October 21, 1962, were you about your business as an employee of the City Police Department of Nashville?
A. Yes, I was.
Q. What particular duties did you have on that occasion?
A. I was working in the booking room as a booking clerk and had the detail work in the office.
Q. Now, Mr. Claiborn, I am going to give you these certain items here, and ask you first of all what is your procedure for releasing a man from the city jail—what is your procedure for releasing him, and giving his property back?
[fol. 1018] A. First, we make an identification of the person's name on the arrest sheet.

Mr. Looby: If your Honor please, the defendants insist that this is incompetent as to procedure. You may testify as to what you did for certain defendants.
The Court: That's right.
Mr. Looby: And not to what you did in general.
The Court: Ask what you did to certain specific defendants.
Mr. Robinson: All right. I want you to look at these exhibits. I will start out with exhibit #1 and ask you what this is here relative to the receipt for property. What is that? Is it signed?

A. This is the signature here of the person—the arrest slip of the person who had been arrested. And he signs to receive his property back, when he is making bond.

Q. Now, look at the signature on that, and tell me—

Mr. Looby: I am objecting to this witness—when Counsel asked him about the signature, he simply said the "person".

Mr. Robinson: Did you see the man sign that?

A. Yes, sir. I had to.

Q. Well, why does that happen?

A. Well, I had to, or he wouldn't have gotten his prop-
[fol. 1019] erty back.

Mr. Looby: Did he see him?

The Court: You saw him? That's right!

Mr. Robinson: That's what he said, if your Honor please. Did you see that man sign that slip?

A. Yes, sir. Yes, sir, I did.

Mr. Robinson: What name appears on that slip?

Mr. Williams: We object to that, if your Honor please, as being incompetent also. No identification has been made of the signature.

Mr. Robinson: We made it, if your Honor please.

The Court: Well, that's competent, for him to say what signature appears on there.

Mr. Robinson: Whose signature appears on that particular slip?

A. Lester G. McKinnie.

Q. All right, now, I am going ahead to do the other slips. I hand this one to you, and ask what name appears on that slip and if you saw that particular man sign it, the slip for property returned?

A. This is Allen Cason, Jr., and I saw him sign it.

Mr. Williams: Same objection, if your Honor please.

The Court: All right.

[fol. 1020] The Court: Same ruling.

Mr. Robinson: Look at #3. Would you look at that and tell me if you saw that man sign and, if so, what his name is?

A. This is the signature of Frederick Hargraves. And I saw it also signed.

Mr. Williams: Same objection.

The Court: To save time, we will treat this as your having objected—

Mr. Looby: He saw a man sign it, which he said was Frederick Hargraves. But he can't testify that unless he knows Frederick Hargraves.

The Court: Oh, no. He is saying a person—

Mr. Looby: That's all right, your Honor.

The Court: A person signed that that represented that name. He doesn't identify any person there.

Mr. Williams: We object to that—even that, as being incompetent, if your Honor please, because it is entirely irrelevant to any issue in this case.

The Court: Overruled.

Mr. Robinson: Now, I hand you a 4th paper and ask you if you saw the individual who signed that? Or a man who purported to be this particular person that signed that, that slip, and received property back?

A. Yes, sir.

Q. Who is that?

[fol. 1021] A. This is Nathal Winter.

Q. All right. Now, here is a 5th slip. I will hand you that and ask you the same question: did a man purporting to be that person indicated that slip, sign that and receive property back?

A. Yes, sir, this is Harrison Dean.

Q. All right. Now, on the 6th paper, I ask you that same question, if a man purported to be the person that signed that appended his signature thereto and received property?

A. This is John Jackson. I also saw him.

Q. #7. Here is another piece of paper, and I ask you the same question if you saw the man sign that who is purported to be the person named on that paper?

A. Yes, sir, this is Frederick Leonard. I also saw him.

Q. And #8. I will ask you again if you saw a person who purported to be that particular individual sign that paper and receive property?

A. Yes, sir, this is John Lewis. I also saw him, when he signed it.

Q. Now, at what time did these defendants sign this—I don't mean the particular hour, but did they sign these just prior to being released?

A. Just prior to receiving their property and at the [fol. 1022] same time the bond was signed.

Q. I see. At the same time the bonds was made for their release.

Is that the last thing that you do with the defendant before he is freed?

A. Usually sign the bond, and then at the same time, the—arrest slip—

Mr. Looby: Objection, your Honor please, unless it was in this particular case.

Mr. Robinson: What happened in these particular cases?

A. To the best of my memory, they signed their bonds and then the arrest slips.

Q. And then they left?

A. Yes, sir.

Q. That's all. You may ask him.

Cross examination.

By Mr. Williams:

Q. Mr. Claiborn, you cannot identify any particular individual today as being the persons who signed those documents?

A. No, sir. I couldn't identify them personally.

Q. That's all.

[fol. 1023] The Court: Come down, please.

M. L. Pyburn, called as a witness on behalf of the state, being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. State your name, please.

A. M. L. Pyburn.

Q. What is your occupation?

A. Patrolman, City of Nashville Police Department.

Q. How long have you been a police officer for the City of Nashville?

A. 5 years, a little over.

Q. On October 21, 1962, were you about your duties as a police officer for this city?

A. Yes, sir.

Q. Did you have any occasion to go to the B & W Cafeteria on 6th Avenue?

A. Yes, sir.

Q. What car—what automobile were you in when you went to that particular place?

A. Car #1.

Q. Car #1? Is that an uptown car, is it?

[fol. 1024] A. Yes, sir.

Q. A zone car?

A. Yes, sir.

Q. You are connected with the Patrol Division?

A. Yes, sir.

Q. All right. Now, how did you receive your call to go to the B & W?

A. It come over the radio in the car.

Q. You received information to go there? And did you go there?

A. Yes, sir.

Q. What was the situation? What did you see when you got there, to the B & W Cafeteria?

A. Uh—there's 8 colored boys standing in the vestibule.

Q. Did you walk up to the vestibule and look in?

A. Yes, sir.

Q. All right. Did you have any conversation with any of the men in the vestibule?

A. At that time, no, sir.

Q. You had none? Who was with you?

A. Mr. Moran.

[fol. 1025] Q. How were they situated in the vestibule of the B & W?

A. When we first got there, they was standing all over the vestibule.

Q. All right. Mr. Moran, you say, was with you?

A. Yes, sir.

Q. Did he accompany you to the vestibule?

A. He accompanied me to the door, yes.

Q. All right. What did you do after you saw all these defendants in the vestibule? What did you do?

A. I told Mr. Moran to go back to the car and radio to Sgt. Beehan to meet me up there.

Q. All right. Did Sgt. come?

A. Yes, sir.

Q. All right. Did you have any conversation wtih any of these defendants prior to Sgt. Beehan arriving at the B & W?

A. No, sir.

Q. You did not? What happened—after the Sgt. got there, what was then done with the 8 men in the vestibule?

A. Well, at that time, nothing. He walked in and went back in there to see the man on the door, Mr. Williams, I believe, was his name.

[fol. 1026] Q. Yes, sir. And what was the ultimate outcome, and what happened to these defendants when they came out of that vestibule?

Mr. Looby: We object, if your Honor please, to him referring to these 8 men as these defendants.

Mr. Robinson: He knows that.

The Court: No. He is objecting to you referring to these defendants—to the 8 men—

Mr. Robinson: Well, let me rephrase it, if your Honor please, and I beg your pardon.

Now, what happened to the men in the vestibule?

A. At that time, nothing. He talked to Mr. Carrier and Mr. Williams. The Sgt. did. I didn't. And Mr. Carrier said he would prosecute them, and he wanted them arrested, and we arrested them.

Q. All right. What happened?

A. Mr. Moran got his ticket book out and made out the tickets—wrote down each one of 'em's name and what he was charged with.

Q. All right.

A. We put them in the unit and brought them to police headquarters and booked them.

Q. You went to the police headquarters?

A. Yes, sir, but I went to the Lieutenant's office, and not the booking office.

Q. Did the same group of men that came from the vesti-
[fol. 1027] bule at the B & W end up at the police station?

A. Yes, sir.

Q. No doubt in your mind about that?

A. No.

Q. All right, sir, and what happened to them at the police station?

A. So far as I know, Mr. Robinson, they was booked.

Q. Booked and lodged in jail there?

A. Yes, sir.

Mr. Williams: I object to that statement about them being booked, unless he was there.

The Court: Well, he just said so far as he knows. He qualified it.

A. As far as I know.

Mr. Robinson: That's all.

Cross examination.

By Mr. Looby:

Q. What is your name?

A. Pyburn.

The Court: P-y-b-u-r-n.

Mr. Looby: Mr. Pyburn, you say you got a call and went over there, and the next thing you did was arrest the 8 men you found there?

A. No, sir, I said the next thing I did was call the Sgt.
[fol. 1028] Q. Sgt. Beehan? Wasn't it?

A. Yes, sir.

Q. And then what did Sgt. Beehan do?

A. Well, as I stated before, he went in and talked to Mr. Williams and Mr. Carrier.

Q. Who was Mr. Williams?

A. The doorman on the door.

Q. The doorman?

A. That's right.

Q. And Mr. Carrier was the manager?

A. That's right.

Q. And they told you—who was the one who arrested them?

A. The Sgt. told me.

Q. The Sgt. told you to arrest them? You had no warrants?

A. No, sir.

Q. And what did you arrest them for?

A. Uh—at that particular time, I believe it was a state law about blocking a fire exit, I am not sure.

Q. About what?

A. Blocking a fire exit—state law.

Q. Blocking a fire exit? And that is what you arrested them for?

[fol. 1029] A. That's what I was told. I don't know.

Q. Who told you?

A. As I said, I wasn't inside but just a little bit. I was outside the door.

Q. You went in when you arrested them, didn't you?

A. Yes, sir, I went in and brought them out as they had their names wrote down.

Q. At the time you arrested them, you did so at the request of your superior officer? Now, what's your rank, please, sir?

A. Patrolman.

Q. And Sgt. is your superior officer?

A. Yes, sir.

Q. So that you arrested them at the request of your superior officer? For blocking a fire escape, is that it?

A. That's right. Yes, sir.

Q. What was Mr. Williams doing?

A. He was standing in front of the second door as you go in through the vestibule.

Q. Blocking the door? Keeping them out?

A. That's right.

Q. Isn't it true, Mr. Pyburn, that when you went in, there were 4 of these men standing on one side of the door and [fol. 1030] 4 standing on the other side?

A. Not when we first went in.

Q. Well, were there ever, at any time, 4 standing on one side of the door, and 4 on the other?

A. Yes, sir.

Q. There was ample room for you to go in, wasn't there?

A. Well, let's put it this way. I'm a little bit bigger than some people, Mr. Looby. I had a little bit more trouble.

Q. You have trouble getting in?

A. I had to turn sideways. I couldn't walk in straight.

Q. But you did get in?

A. Yes, sir.

Q. But a person medium size could get in?

A. Yes, sir. I would say so.

Q. But had it not been for the doorman blocking the door, that people couldn't go in and out, and these men were standing there, silently, could one not have gone in except for Mr. Williams blocking the door?

A. If the door hadn't been locked, anybody could have walked in.

Q. By "locked" the doors were shut, weren't they?

[fol. 1031] A. Shut.

Q. Were they locked?

A. Well, I couldn't say it was locked. I didn't see no lock on it. But the door was shut, and Mr. Williams was standing at the door.

Q. Mr. Williams was standing there at the door blocking it?

A. That's right. He was standing at the door.

Q. Don't you know that the doorman had a key and locked it every time somebody went in and came out?

A. I didn't pay that much attention.

Q. But you did get in?

A. Sir.

Q. You got in?

A. Did I get in?

Q. Yes?

A. I got to the door.

Q. Which one—the first, or second door?

A. Well, I got through both doors.

Q. Both doors? And didn't Mr. Williams unlock it for you to go in?

A. For me?
Q. Yes, sir?
A. Yes, sir.
Q. And Mr. Carrier was there, too?
[fol. 1032] A. Mr. Carrier came down later. Just a few minutes later.
Q. Yes, sir? And Mr. Carrier himself went down through?
A. Sir?
Q. Mr. Carrier is as big a man as you, isn't he?
A. Uh—he is almost as big as I am, I think, yes, sir, but he was upstairs. He come down from his office, Mr. Looby. He didn't come through the door.
Q. Did Sgt. Beehan come in?
A. Into the vestibule?
Q. Yes?
A. Yes, sir.
Q. He had no trouble getting in, did he?
A. Nothing except just pushing the door open.
Q. Who pushed the door open? Which door? The first door or the second door?
A. He did. The first door.
Q. And did he get in the second door?
A. Yes, sir.
Q. He had no trouble getting in the second door?
A. No, sir, Mr. Williams pulled the door open for him.
[fol. 1033] Q. He opened the door?
A. That's right.
Q. Then he could let anybody in that he wanted to?
A. That's right. That's right.
Q. Did you talk to—do you know Mr. Crockett, the lawyer?
A. No, sir, I do not.
Q. Who else did you talk to besides Mr. Williams and Mr. Carrier?
A. I didn't talk to no one.
Q. That will be all, Mr. Pyburn.

The Court: Stand aside, sir.

SANFORD S. MORAN, being called as a witness on behalf of the state, and being first duly sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Please state your full name.
A. Sanford S. Moran.
Q. What is your place of employment?
A. Nashville City Police Department.
Q. How long have you been with them?
[fol. 1034] A. 5 years.
Q. Were you a policeman for the City of Nashville, and about your business as such on the 21st day of October, 1963? (Court Reporter's note: Both shorthand and Tandberg recorder show this man to have said "'1963" therefore it is typed in this record.)
A. Yes, sir.
Q. What was the automobile number that you were riding in?
A. Riding in Car #1.
Q. Who was with you?
A. Mr. Pyburn.
Q. Did you receive a call to go to the B & W Restaurant?
A. Yes, sir.
Q. What time of the day or night was it?
A. That was approximately between 12:30 and 1:00 o'clock in the day.
Q. When you arrived at the B & W Restaurant, what did you do?
A. We went over to the restaurant, and seen 4 boys standing on either side of the restaurant, and I turned around and went back to the car and called for our superior officer.
Q. How many boys—in all, how many Negro boys did you see in the vestibule?
[fol. 1035] A. There were 8.
Q. Did you take their names down?
A. Yes, sir, after the superior officer got there and

talked to Mr. Carrier. He asked them to move on, which they refused to do, and he said, we'll have to take them to jail.

Q. All right. Did you write down the names of those people in that vestibule?

A. Yes, sir.

Q. Do you have that list with you?

A. I have it here on my book.

Q. Did you make it in your own handwriting?

A. Yes, sir.

Q. All right, read what—read the names that you got in the vestibule.

Mr. Williams: We object to that as being incompetent and irrelevant, if your Honor please.

The Court: Overrule your objection.

Mr. Robinson: Go ahead and read them.

A. (Reads.) Lester G. McKinnie, John Jackson, Jr., Allen Cason, Jr., Frederick Leonard, John Robert Lewis, Frederick Hargraves, Harrison Dean, Nathal Winter.

Q. All right, who told you those names?

[fol. 1036] A. As far as I can remember, now, as far as identification purposes, I couldn't recognize these boys because we were trying to get this situation cleared up.

Q. All right. But did—did—you know who told you the names, don't you? In other words, there's someone told you the names?

A. Yes, sir.

Q. Who was it?

A. The 8 boys in the vestibule.

Q. The 8 boys in the vestibule? Now, what happened after you got their names?

A. They were taken out and put in the paddy wagon, and taken to the city jail.

Q. Did you go with them?

A. We followed the car down there, yes.

Q. And there is no doubt about their arriving at the jail?

A. Yes, sir, there's no doubt about arriving at the jail.

Q. You may ask him.

Cross examination.

By Mr. Williams:

Q. Let me ask you if you were with them when they were booked, or anything of that nature?

[fol. 1037] A. I was in the booking room, but I was at a desk, and wasn't paying any attention to the booking of them.

Q. You just turned them over to somebody else, then?

A. Yes, sir.

Q. How many people were in the paddy wagon?

A. There were 8.

Q. 8? And Mr. Moran, are you sure that there wasn't 9?

A. No, sir. There was 8.

Q. 8? You didn't pick up anybody else?

A. No, sir.

Q. Mr. Moran, did you get out and go in at the B & W?

A. When we first arrived, I went up to the front door, and seen what the situation was, and I went back to the car and called for the superior officer.

Q. Were you driving? Or Mr. Pyburn?

A. Was I what?

Q. Were you driving? Or was Mr. Pyburn driving?

A. Mr. Pyburn was driving the police car.

Q. And which way did you all come—did you go east or [fol. 1038] north when you got the call?

A. When we arrived on 6th Avenue, we were going south.

Q. Going south?

A. Yes, we were going toward Broad Street, and when we arrived we were on the opposite side of the street.

Q. And there were 4 of them on one side and 4 on the other side?

A. When we first arrived there, yes, sir.

Q. You and Mr. Pyburn?

A. Yes, sir.

Q. And did you see Mr. Pyburn go in?

A. Yes, sir, he went inside the door.

Q. He went in behind those swinging doors that open in the center into the vestibule?

A. Yes, sir.

Q. And he walked down between the lines?

A. Well, now, I didn't watch too closely to him. I went back—when I seen what was going on—I went back across the street, and called the Sgt.

Q. You didn't come back and go inside?

A. Yes, after the Sgt. got there, I did.

[fol. 1039] Q. And you went into the vestibule there? And you had plenty of room to go in?

A. Yes, sir, but it was kind of hard to do without hitting one of these boys with the door.

Q. You mean without touching them?

A. Without hitting them with the door—to what it opened ordinarily—it wasn't an—a normal opening. If you swung it open ordinarily,—

Q. You mean when you would swing the door back, and when it would go back, it would go back against the people standing there, but there wasn't any difficulty getting through there once you got in?

A. Well, like I say—it wasn't a normal opening. If I had shoved the door open like I usually walk in the place, I proba'ly would have hit one of them.

Q. Yes? What I mean is—you were able to go through it?

A. Oh, I could get through it, yes.

Q. And, when you got to the inner door, how did you get through that inner door?

A. I didn't go through the inner door.

Q. Do you remember seeing the doorman standing there by you?

A. No, I don't remember.

Q. You didn't try the inner door at all?

[fol. 1040] A. No, I didn't try the inner door.

Q. Did Sgt. Beehan come subsequently?

A. Yes.

Q. How long was it before he arrived?

A. I don't actually remember, Mr. Williams. Like I say, we were trying to keep our eye on the situation.

Q. Well, when he came, had you already come into the vestibule?

A. No, sir.

Q. Did he go into the vestibule before you? Or after?

A. Yes, sir, he went into the vestibule before I did.

Q. Did you see him go through?

A. Yes.

Q. He was admitted to the interior of the restaurant? Was he not?

A. Yes.

Q. And I believe that was done through that second door by the doorman?

A. Yes, sir.

Q. I will ask you, were you the one that took these Negro persons out of the vestibule?

A. There was two of us took them out, walking out [fol. 1041] with them.

Q. You and who?

A. I believe Mr. Pyburn.

Q. You and Mr. Pyburn?

A. Yes.

Q. Where did the paddy wagon come from?

A. The paddy wagon came from toward Broad Street on 6th Avenue.

Q. Is 6th Avenue a one-way street?

A. Yes, sir, it is.

Q. One way coming north or south?

A. Going south.

Q. Then the paddy wagon was on the wrong side of the street? Is that right?

A. No, the paddy wagon was going toward Broad Street.

Q. Going toward Broad Street? Oh!

A. Going towards Broad Street, yes, sir.

Q. And you took them across the street, then?

A. Now, to be specific, I can't remember that much—

Q. You don't have to. You say you stood in the vestibule there, and asked each person who was there his name?

A. And asked them their name.

[fol. 1042] Q. And then you wrote it down?

A. I wrote the names down on pads.

Q. And the persons voluntarily gave you their names?

A. Yes, sir.

Q. I believe that is all.

Gen. Nichol: If your Honor please, we planned to have Mr. Shea next, and since he is sick and can't be here, if

your Honor please, I would like a moment for Mrs. Ridley to look at these records, and refresh herself. If we can have a few moments and let the jury step out while we do this.

The Court: All right.

(The jury retires at 9:30 to 9:42.)

The Court: All right, gentlemen.

MRS. ALMA RIDLEY, called as a witness for the state, being sworn, testified as follows:

Direct examination.

By Mr. Robinson:

Q. Is this Mrs. Alma Ridley?

A. Yes, General.

[fol. 1043] Q. I believe you are chief deputy criminal court clerk, of Davidson County, Tennessee? Is that correct?

A. That's correct.

Q. Now, Miss Alma, I want to hand you a book, and ask you to identify this book.

A. This is the Appearance Bond Book for the General Sessions Court of the County.

Q. And where is that kept?

A. In the criminal court clerk's office.

Q. Is that a part of the official record of that office?

A. That is, yes.

Q. Now, please, ma'am, I will ask you if on the 21st day of October, 1962, if one Frederick Leonard according to your record, made bond in that book?

A. Yes, sir.

Mr. Williams: I object to that, if your Honor please. He can ask her if some person was identified.

The Court: Well, that's all he's saying.

Mr. Williams: He was asking her if Frederick Leonard made bond.

The Court: Yes, that is what he is saying, Members of the Jury,—

Mr. Williams: And we—

The Court: He is just asking her if some one who identi-
[fol. 1044] fied himself as Frederick Leonard and made a bond on that date.

Mr. Williams: We still object to that, if your Honor please, as being incompetent,—as the defense counsel.

The Court: Overruled.

Mr. Robinson: Now, Miss Alma, on the appearance bond of Frederick Leonard, would you read please, ma'am, and see if there is a warrant number on that bond?

A. Yes, sir. On page 325, state—

Mr. Looby: I wish, if your Honor please, that we might see that before going into it—

(Mr. Looby looks over the book, and Mr. Williams looks over the book.)

Mr. Williams: Mr. Robinson, might I see the warrants?

Mr. Robinson: Be glad to.

(Mr. Williams and Mr. Looby compare the warrants with the book.)

(Mr. Robinson gets the book back.)

Mr. Robinson: Now, Miss Alma,— If you will read on the bond made by Frederick Leonard, or the person purporting to be Frederick Leonard, and tell me the number on that bond.

A. It shows City Warrant #1153.

Q. And I will hand you this exhibit that has been introduced in evidence, and ask you if that isn't a city warrant, and what number is on it?

[fol. 1045] A. Yes, it says City of Nashville vs. Frederick Leonard, #1153.

Q. All right, now, let me refer you please ma'am, to bond made by a person purporting to be John R. Lewis?

A. Yes, sir.

Q. And I will ask you, Miss Alma, if on your record as shown there if there is a city warrant number on that particular bond?

A. Yes, sir, State vs. John R. Lewis #1154.

Q. All right, ma'am, I am going to give you the city warrant, and ask you to please tell what the number is on that warrant.

A. It shows City of Nashville vs. John R. Lewis #1154.

Q. Does that number correspond with the bond made on your record?

A. Yes, sir.

Q. All right. Now, please, ma'am, I refer you to John Jackson, Jr.

A. Yes, sir.

Q. I ask you, Miss Alma, if that bond indicates any warrant number?

A. City Warrant #1151.

[fol. 1046] Q. And I hand you another exhibit and ask you if that isn't a city warrant, and if so, what number is on that one?

A. It is City of Nashville vs. John Jackson, Jr. #1151.

Q. Yes, ma'am. I hand you, Miss Alma, and refer you to the person who made bond purporting to be Harrison Dean, and ask you, please, ma'am, if it indicates a city warrant number?

A. City Warrant 1156.

Q. All right, I hand you this exhibit and ask you if that is the same defendant, and what the warrant number is?

A. City of Nashville, vs. Harrison Dean, #1156.

Q. Now, I refer you, please, ma'am, to Nathal Winter—is it designated on that bond what city warrant number?

A. City #1157.

Q. And now, I give you this city warrant and ask you what number that is?

A. City of Nashville vs. Nathal Winter, #1157.

Q. Now, I refer you to Frederick Hargraves.

A. It shows Frederick Hargraves, City Warrant #1155.

[fol. 1047] Q. All right. (Hands her a paper.)

A. City Warrant, City of Nashville vs. Frederick Hargraves, #1155.

Q. Now, Miss Alma, I refer you please ma'am, to Allen Cason, Jr., and ask you is there—is a city warrant indicated on that bond?

A. City vs. Allen Cason, Jr. 1152.

Q. And I hand you this warrant and ask you if those numbers correspond?

A. City of Nashville vs. Allen Cason, Jr., 1152.

Q. Now, Miss Alma, I refer you to Lester G. McKinnie. Do you have that bond there?

A. Yes, sir, I do have.

Q. All right. Is there a city warrant number on that bond?

A. It says City Warrant #1150.

Q. (Hands her a paper.) And what does that say?

A. It says City of Nashville, vs. Lester G. McKinnie, #1150.

Q. Now, Miss Alma, on making these state bonds, what then did the—was the procedure for releasing—

[fol. 1048] Mr. Looby: I object to him referring to procedure.

Mr. Robinson: I am referring to these particular bonds, on these 8—that we have gone over, if your Honor please. I am not referring to anybody else in this book besides these 8. They have already been identified.

The Court: All right.

Mr. Robinson: Relative to these particular people,—these 8 in that book, what then did the clerk's office do in order to release these named people from jail?

Mr. Looby: We object, if your Honor please, unless Miss Alma knows what was done. Not the procedure, unless she knows what was done.

Mr. Robinson: Well, I hand you here—I can get at it another way, if your Honor please. Miss Alma, I hand you an exhibit that has already been introduced in evidence and ask you, please, what this yellow slip is?

A. This yellow slip is a release signed by Judge Walker. When a city warrant is brought over,—the warrants have to be brought over—

Mr. Looby: We object to that, if your Honor please. She is just telling the procedure. We are losing a lot of time doing nothing. But that is what the state is doing—doing nothing. That's exactly what they're doing.

Mr. Robinson: Well— If your Honor please, I am letting him run his half of the lawsuit, and I am just trying to do my part.

[fol. 1049] The Court: All right.

A. This is a release signed by Judge Walker showing the bond is made in General Sessions Court on this charge.

Mr. Robinson: Yes, ma'am.

Mr. Williams: Well, I object to it as being incompetent, and hearsay.

Mr. Looby: We must say, Miss Alma, that it appears to be that of Judge Walker. She can't say whose it was.

The Court: That's right. General, that is obvious.

Mr. Robinson: Have you ever seen Judge Walker write his name, Miss Alma?

A. Yes, I will say that this appears to be Judge Walker's signature, where he signed on that.

Mr. Robinson: Does that seem to be true on each of these exhibits, please, ma'am, just to save time?

A. Yes, each release bears the same signature.

Q. All right. Now, Miss Alma—

Mr. Williams: We object to that on each case.

The Court: Overruled.

Mr. Robinson: Now, Miss Alma, referring to your bond book, and your official record, tell me if there is a signature on that bond in the name of Frederick Leonard?

[fol. 1050] A. Yes, sir, it is signed as a principal.

Q. As a principal on the bond?

A. Yes, sir.

Q. And who is the surety on that bond?

A. Ixenia Ross? Is it?

Q. Ianthia Ross.

A. It looks like I-a-n-t-h-i-a Ross.

Q. And I will ask you, Miss Alma, if the name, Frederick Leonard, is signed on that bond?

A. It is as the principal.

Q. Now, I refer you to John Jackson, Jr. Is his name signed on that bond?

A. Yes, sir, John Jackson, Jr., is signed as principal.

Q. And who is the surety?

A. Same surety.

Q. Same surety? All right. Now, I refer you to Harrison Dean and ask you if his name is signed as the principal?

A. It is. Same surety.

Q. I refer you to Nathal Winter, and ask you the same question, Miss Alma.

Is his name on that bond?

A. It is.

[fol. 1051] Q. All right. And is that true for Frederick Hargraves?

A. Yes, sir, it is.

Q. Is that same hting true of Allen Cason, Jr.? Does his name appear on that bond as principal?

A. It does.

Q. All right. Miss Alma, I refer you now to Lester G. McKinnie. Does his name appear on that record?

A. It does.

Q. His name is signed in longhand?

A. Yes.

Q. I ask you now, please, ma'am, about John R. Lewis. Does his name appear in longhand on that bond?

A. Yes, signed John Lewis.

Q. Now, will you make this book a part of your testimony, as an exhibit, please, ma'am?

A. I will.

Mr. Williams: We object, if your Honor please.

Mr. Robinson: Make a photostatic copy as an exhibit?

The Court: Did you say you object?

Mr. Williams: Yes, sir, it is objected to because she was not present when it was made.

The Court: Overruled.

Mr. Williams: It is incompetent because it has no identi-

[fol. 1052a] fication, as to how it was made.

Mr. Robinson: Miss Alma, I will hand you another book, and ask you to identify that book?

A. This is the Appearance Bonds for Criminal Court.

Q. Is this book kept by the criminal court clerk?

A. It is.

Q. In his office?

A. Yes, sir.

Q. And is that a part of the official record of his office?

A. Yes, sir, it is.

Q. All right. Now, Miss Alma, I refer you to one Frederick Leonard.

A. Yes.

Q. Does it appear in that book?

A. Yes, sir, on this page is Frederick Leonard.

Q. What bond book is that? What page?

A. This is bond book #74, page 135.

Q. Now, does the defendant—does the man's name appear there by the name of Frederick Leonard?

A. Yes, it does.

Q. All right. And does it—what does that indicate in your book? What is that?

[fol. 1052b] A. This is a bond book to criminal court.

Q. To criminal court?

A. Yes, sir.

Q. Does it bear a longhand signature?

A. It does.

Q. What does it say as to who the principal is on that?

A. Frederick Leonard, signed as principal.

Q. All right. I refer you to John Jackson, Jr., and ask you does a—his name appear on page 135, signed in longhand?

A. Yes, it is on page 135, signed by John Jackson, Jr.

Q. Yes? And Harrison Dean? Does his name appear in that book and is his name signed in longhand?

A. Yes, sir, on page 137, appearance bond.

Q. I refer you, please, ma'am, to Nathal Winter—does his name appear on that book, and is it signed in longhand as defendant?

A. On page 136, and he signed it.

Q. I refer you, please, ma'am, to Frederick Hargraves, [fol. 1053] is his name appearing on that book and did he sign it?

A. On page 136, and he signed it. On appearance bond.

Q. And I now refer you to Allen Cason, Jr. Is his name

on there, and is it written in longhand as principal on the bond?

A. Page 137, signed, Allen Cason, Jr.

Q. Now, I refer you, please, ma'am, to Lester G. McKinnie, if his name appears there, and if it does, is it in longhand where the bond book is marked principal?

A. On page 134, signed by Lester G. McKinnie, principal.

Q. Now, I refer you, please, ma'am, to John R. Lewis. Does his name appear on that bond book in longhand?

A. Yes, sir, on page 134, signed John R. Lewis, principal.

Q. Now, Miss Alma, do you know the reason why these bonds were made both in general session and criminal court? In both bond books? Can you explain that?

A. No, sir, I cannot. I do not know.

Q. You don't know that of your own knowledge?

A. No. I do not. It would be hearsay.

[fol. 1054] Q. All right. Now, would you make a photostatic copy of this an exhibit—

Mr. Looby: Would you mind letting us see the exhibit?

Mr. Robinson: Oh, I'm sorry. I beg your pardon.

(The Attorney General tells Reporter he will furnish photostatic copies to the clerk for filing in evidence.)

Q. Were the appearance bonds made to this particular court for this particular trial?

A. Yes.

Q. In each instance, in each of the 8 cases?

A. That's correct.

Q. Now, may it please your Honor, I want to pass this bond book to the jury and let them view it, and at the same time view the signatures on each of these as has been introduced.

The Court: Well, now, let's get the—let's get those in. What number is the exhibit—is the certified—I mean the photostatic copy of the—what is that? The General Sessions Court? Now, what is that number?

Mr. Robinson: Number—photostatic copy of appearance bonds will be—

The Court: What number is that?

Won't it be easier to let the General Sessions—a photostatic copy of the General Sessions Court bonds—let that [fol. 1055] be made Exhibit #1 to the Direct Examination —Direct testimony of Mrs. Ridley.

(Photostatic copy of General Sessions Court appearance bonds is to be made of the portion testified about by Mrs. Alma Ridley, Chief Deputy, Criminal Court Clerk's office, regarding Lester G. McKinnie, *et al.*, and furnished to the clerk to be filed in evidence.) (Direct Examination of Mrs. Ridley.)

The Court: Now, a photostatic copy of Criminal Court Bond Book will be exhibit #2 to the Direct testimony of Mrs. Ridley. So we can keep the record straight.

(Photostatic copy of Criminal Court Appearance Bond Book is to be made of the portion testified about by Mrs. Alma Ridley, Chief Deputy, Criminal Court Clerk's office, regarding Lester G. McKinnie, *et al.*, and furnished to the clerk to be filed in evidence.) (Direct examination of Mrs. Ridley.)

The Court: They already are in the record. Now—

Mr. Robinson: Now, I want, if your Honor please, to pass exhibit #1 to Miss Alma's testimony, along with exhibits 1 through 8 that have already been introduced into this record. This is for the purpose of the jury viewing both the bond book and on the bond—signatures as signed by these various 8 defendants.

Mr. Williams: May it please the Court, we would like to have an opportunity to Cross Examine.

[fol. 1056] The Court: Well, you may, but he wants to pass the exhibits to the jury.

Mr. Williams: We except to these exhibits being passed to the jury before we have an opportunity to cross examine.

The Court: Overruled. You may pass the exhibits.

Mr. Williams: We respectfully except, if your Honor please.

The Court: Let them use their own judgment.

Juror: Where is the numb r?

Mr. Robinson: Here is the number and here is the signature.

The Court: Have you found the number? Any other questions—address them to the Court.

Mr. Robinson: For the sake of time, if your Honor please, why don't we just turn over at the same time the Criminal Court Book, exhibit #2 to Miss Alma's testimony, and let them see them.

The Court: Just hand it—let the officer hand it to them. I am going to let them use their own good judgment.

Mr. Robinson: All right, sir.

The Court: Now let the jury use their own good judgment, and take their time.

(The jury examines all papers with the two books.)

[fol. 1057] (10:17 a.m.) (The jury has finished examining books and papers.)

The Court: Proceed with your examination.

Cross examination.

By Mr. Williams:

Q. Mrs. Ridley, you were not present when all those signatures were made on the bonds?

A. No, Mr. Williams, I was not in the office.

Q. What you have done here is just reading from a cold record from the clerk's office?

A. I am testifying from the records in the office.

Q. And you know absolutely nothing whatsoever about this case, or any of these defendants?

A. No, I do not.

Q. Mrs. Ridley—the amount of each of those bonds? What was the amount?

A. Mr. Williams, I didn't notice it. I didn't notice the amount.

(The book is brought back to Miss Alma.)

A. $250, the bonds.

Q. Each one of those defendants was required to make a $250 bond in General Sessions Court and in Criminal Court?

A. That's correct here. This is criminal court I refer [fol. 1058] to. I will refer to General Sessions Court. (She looks.) I don't remember the page numbers. (She looks further.) Yes, sir, they are $250.

Q. Now, Mrs. Ridley, do your records show that any disposition was made of those cases for which they were required to make a total of $2,000 in General Sessions Court?

A. Well, as I said, Mr. Williams, I am only testifying to the bonds. I know nothing of the disposition of these.

Q. But the record regarding the disposition and of the General Sessions cases are also likewise under your control?

A. That's true. If there was any disposition of them, we should have them.

Q. But the state has not asked you to bring those records over?

A. No.

Q. So that's a total of $2,000 bond that those 8 defendants were required to make in General Sessions Court? And a total of $2,000 bond against the 8 of them in Criminal Court?

A. It shows that each defendant has a $250 bond in General Sessions and Criminal.

Q. Yes, ma'am. That's all.

Redirect examination.

[fol. 1059] By Mr. Robinson:

Q. Can you tell by looking at these bonds whether they were cash or property bonds?

A. The bond book doesn't indicate that it was cash. It has realty listed here.

Q. It has realty listed?

A. Yes, sir, it does. It is not marked cash bonds, so I assume by the bond book that it is property.

Q. That is all.

The Court: You may stand aside. You may come back to the other side, Mrs. Ridley.

(Mrs. Ridley returns to the clerk's desk on the other side of Judge Draper, since she is filling in for the clerk, Mr. Shea on this particular day.)

The Court: Call your next witness, General.

Otis Williams, called as a witness for the state, being duly sworn, testified as follows:

Direct examination.

(Mr. Robinson started to examine him when Mr. Looby asked if he had been under the rule, referring to Mr. Williams.)

The Court: Oh, sure.

Mr. Williams: I want to ask him something: Mr.—

[fol. 1060] Mr. Robinson: What did you say?

Mr. Williams: (Witness.) Sir? How's that?

Mr. Williams: (Attorney.) He has been walking through this crowd and I have observed him sitting back there every day, if your Honor please.

Mr. Maddin: Now, if your Honor please, he's competent to testify.

The Court: Now, wait a minute, gentlemen! Don't be in such a hurry. Let me examine the witness.

Have you been in here during any of the testimony that has been offered?

A. No, sir. I have been here before it started, but—the trial.

Q. Are you telling me that you haven't heard a single witness testify?

A. Not a single word, no, sir.

Q. Not a word of testimony?

A. Not a word, no, sir. I haven't been in here since they have been trying it, because they told me to stay out, and I did.

The Court: Sure did. That's right. Now, gentlemen, anybody want to take issue with that. I don't know.

Mr. Williams: It seems to me, but I can't swear positively under oath, that I have seen him in the courtroom.

The Court: He swears positively to that and I can't—[fol. 1061] I guess—

Mr. Williams: I don't know whether there is anybody else in the courtroom or not that—

The Court: I—I—I—believe that he has abided by the rule. I have seen him in the hallway here where the Rule is in effect, quite a bit.

(A man in the room raises his hand.)

Mr. Williams: There is a man out here raising his hand, your Honor. That is Mr. Collins, who works here in the court house.

Mr. Maddin: Put him on the stand, if your Honor please.

Mr. Williams: We have no objection to putting Mr. Collins on the stand.

The Court: All right. (Sends Mr. Williams, the witness out.) Ask Mr. Collins to come round.

(Mr. Collins is sworn by the clerk.)

The Court: All right. Now, when—when did you come in this morning?

A. I came in. This is my second trip in here. He was talking with someone right back there this morning. And got up and went out the door there.

The Court: Well, now, you didn't answer my question. Let's don't—don't you get there too quickly.

A. All right, sir.

[fol. 1062] Q. When did you come in? Were you here when court was opened?

A. No, sir, I wasn't here when court was opened, but I came in, I guess, shortly afterward. I imagine.

Q. Well, who was testifying when you came in?

A. Some man was on the stand.

Q. Describe him.

A. I can't say what he looked like. But I do know that some gentleman was on the stand.

Q. Can't you tell me what he looked like?

A. No, sir, but I do know that there was some gentleman on the stand.

The Court: Now, wait a minute. I want to know when you came in? Who was testifying?

A. I can't say.

Q. Well, who was testifying when this gentleman here was in the courtroom?

A. Let me see. It was about the second man after I came in here.

Mr. Maddin: We can't hear what he is saying, if the Co urt please.

A. I said about the second man after I came in here.

Q. Who—who was testifying when—Mr.—whatever the [fol. 1063] witness' name is—

A. Williams.

The Court: Williams? Who was testifying when Mr. Williams came in the courtroom?

A. I don't know. I think you had the second man on there, because I was sitting there back at the back.

Q. Who was the second man on? Now, you tell me.

A. I don't know who it was. I didn't hear the man's name called. He was kind of a slender fellow. I will tell you who it was. It was one of the officers.

The Court: Is that right? I have had three officers on.

A. I know. You had one on when Mr. Williams was sort of asking about him coming up 6th Avenue with the paddy wagon. And he asked him which way did he came? And—then he finally told him which way he come. He asked him, Well, you came up on the wrong side of the street, then.

Q. You do not know which officer that was?

A. No, sir, I do not. But I know I can show him to you if he come back in here. I know that, I'd know him.

Q. How long did Mr. Williams stay in here?

A. Mr. Williams?

[fol. 1064] Q. Yes?

A. Mr. Williams ain't never been out.

Q. I am talking about the witness, Mr. Williams, not the lawyer, Mr. Williams.

A. I don't know. You kept him on here for a good little while at this.

The Court: What?

A. He stayed in here—oh, you mean the man that just went out of here?

Q. That's right.

A. Oh, that man that just went in—he stayed back there sitting right where that man right yonder is sitting with the light jacket on,—on the end there.

Q. I want to ask you—

A. I imagine he set there around 15 or 20 minutes, or longer, your Honor, cause I was—

Q. You see, there—

A. —cause I was—

Q. Did you hear anybody else's testimony?

A. I don't remember, but I do recall him a-comin' and a-askin' somebody—

The Court: Anybody want to ask him anything?

Mr. Williams: Mr. Collins, is it your testimony that you were sitting back there at the time I was interrogating the witness—

A. Yes, sir.

[fol. 1065] Q. —About which way the paddy wagon was going on 6th Avenue?

A. That's right.

Q. And that man—this gentleman just preceding you on the witness stand—was sitting right here in the courtroom?

A. That's right. To my knowing.

The Court: I am of the opinion that the witness is competent. Bring him in. I don't believe he violated any—

Mr. Williams: But we have testimony here by a man who saw—your Honor.

The Court: The Court is satisfied that the witness is competent. Bring him in.

Mr. Williams: Respectfully except, your Honor.

(Mr. Collins is stepped down.)

(Mr. Otis Williams returns to the witness stand.)

The Court: Examine him.

Mr. Maddin (Again starts the Direct Examination.) Would you state your name, please, sir.

A. Sir?

Q. State your name?

A. Otis Williams.

Q. Where are you employed, Mr. Williams?

A. With the B & W Cafeteria.

Q. In what capacity?

A. Doorkeeper.

[fol. 1066] Q. How long?

A. Well, I have stayed from somewhere the last of September to October.

Q. When were you first employed?

A. Sir?

Q. When were you first employed?

A. Well, I can't say just exactly the day, but it was sometime right at the last days of September or the first of October.

Q. All right. Now, I'll ask you a question: on October 21, 1962, were you so engaged in this employment?

A. How's that?

The Court: Gentlemen, I want the record to show now, that even if the witness was in the back of the courtroom, I don't believe he could have heard a word that was said. (Laughter in the courtroom.) He is having difficulty hearing up here. Now, Mr. Williams, you do have a little difficulty with your hearing?

A. Yes, I do.

Q. And that is no fault of yours, of anyone.

A. That's right. I can't understand.

Q. That is exactly right, and that's the reason I want him to talk slow, clearly and distinctly—

A. That's right.

Q. —so that he can hear.

A. That's right.

[fol. 1067] The Court: All of you counsel observe that rule with reference to this particular witness.

Mr. Williams: If your Honor please, for the record, for the purpose of the record, we object to the Court's drawing a conclusion as to the witness' hearing,—

The Court: Well, I want—

Mr. Williams: —and his ability to hear at the back.

The Court: —the record to show that.

Mr. Williams: Well. (Starts to say something which is not undertandable because the Court drowns him out.)

The Court: I don't think he was in here, and I am of the opinion that, if he had been, he couldn't have heard anything that was said at all.

Mr. Maddin: Now, Mr. Williams, if I am not heard by you clearly, please indicate it to me. (Comes toward front.)

The Court: Well, I think you ought to stand back there, so they can hear. If you are up here, he won't talk so the jury can hear.

Mr. Maddin: (Moves back some.)

The Court: Now. If you can hear him, the jury can.

Mr. Maddin: On Sunday—

The Court: Thank you, sir.

Mr. Maddin: —October 21, 1962, were you engaged in your employment at the B & W Cafeteria as doorman?

A. I sure was.

[fol. 1068] Q. On that day, shortly after 12 o'clock, did anything unusual occur?

A. I should say so.

Q. What was that?

A. I had a bunch of white people coming in from church, and they was coming in—just a line of them, and then 8 of these colored boys rushed right in with them, all at the same time, right in the doorway, and I caught the door going into the cafeteria, and stopped them there, and the white people, too, and the place was just jammed full.

Q. All right, now let me stop you to ask you: how many Negro boys came in there?

A. 8.

Q. 8?

A. That's right.

Q. How are you certain of that, Mr. Williams?

A. Huh?

Q. How do you know that?

A. I counted them, different times to see.

Q. Now, what did you do when they came into the vestibule?

A. You mean when they came into the doorway?

Q. When they came through the first set of double doors, what did you do?

[fol. 1069] A. Well, the white people was coming—all of them was, at the same time. I just grabbed holt of the doors like this (he demonstrates)—they was all unlocked.

Q. All right.

A. And helt the doors that-a-way. And they pushed right into my arms and tried to push me loose from the doors, but they couldn't do it.

Q. All right. So the doors you are referring to are coming out of the inside double doors?

A. That's right—comin' into the eatin' place.

Q. Those doors have bars across the face of them, do they not?

A. Both doors.

Q. Now, let me digress a moment, and ask you about the vestibule. Do you know its size? What are the dimensions of the vestibule?

A. You mean what they said to me?

Q. No, Mr. Williams, have you taken occasion anytime to measure the inside of the vestibule?

A. I don't think so. I don't understand it, if I do.

Q. Do you know how deep and how wide the vestibule is?

A. You mean in between the doors?

Q. Yes, sir?

[fol. 1070] A. I sure do. I've got it right here.

Mr. Williams: We object to him reading it.

A. It is 6 feet in length.

Mr. Maddin: Wait a minute. Did you measure it?

A. Yes, sir.

Q. What changes have been made in the vestibule since the occurrences on October 21, 1962?

A. None whatsoever.
Q. Did you make a notation of the measurements?
A. Yes, sir. It is correct.
Q. Is that what you are holding in your hand?
A. Yes, sir.
Q. Read the dimensions.
A. Let's see—

The Court: Read the dimensions.

A. It's 6 feet in length, 6 feet and 4 inches wide. Just 4 inches difference, it is 4 inches wider. I mean than the length coming in the door, makes the difference.
Q. It is 6 feet by 6 feet 4? Is that right?
A. That's right.
Q. All right. Now, then, when you saw those boys inside the door and they were pushing, what did you then do?
[fol. 1071] A. Well, I told 'em, I said, Now, we don't serve colored people in here. I want to be nice to you, but we don't serve 'em,—colored people in here, and you can't come in.

Mr. Williams: Objection, if your Honor please.
The Court: I can't find any objection in that. Go ahead.
Mr. Maddin: You told them you didn't serve colored people in here, and what else?

A. I said we didn't serve colored people in here, and you can't come in. Well, they said to me, said, We're comin' in and goin' to eat when we git in. I said, No, not as long as I am at this door. By that time, I got some help. That was Mr. Carrier, and—
Q. All right. What other steps did you take to prevent them from coming through that door?
A. Well, the only thing I could do was—the only thing I had a right to do was just to keep them out by main strength, and that's all, and when I tried to let one of these white people that was caught in there with them in the cafeteria, or let one out, why they'd just ram into the door, and push them up against the wall, or against the doors, and I just had a time a-gettin' what few was caught in there inside and gettin' them out.

Q. All right. Mr. Williams, from the time you first saw these 8 colored boys—

A. Yes, sir.

[fol. 1072] Q. —till the time they took them away, how much time there—passed?

A. Well, I couldn't say. But about 40 minutes, or 45. Something like that.

Q. All right.

A. I'm not sure about that.

Q. During that 40 to 45—

A. How was that?

Q. During that 40 to 45 minutes, did you leave the doorway at any time?

A. No, sir. I stayed with it. I couldn't leave it. Had, they'd a-come on in.

Q. How did the 8 colored boys leave?

A. Leave?

Q. Yes, sir?

A. They carried them.

Q. Who carried them?

A. Officers. I don't know the officers' names, but they carried 'em.

Q. Police officers?

A. Yeah.

Q. All right. Did any of them leave—any of the 8 that you saw, leave before they were taken away by police officers?

A. No, sir. I counted them when they went out with them. [fol. 1073] They took them all. I wanted to be sure they did have them all, so they wouldn't be nairn left there to bother me when they got away with 'em.

Q. All right.

A. And they had 'em a-holdin' them when they went out with 'em.

Q. Do you see any of those 8 in this courtroom?

A. Do I?

Q. Yes, sir.

A. I sure do.

Q. Identify the ones you recognize.

A. Well, my eyesight is sort of like my hearing.

Q. All right, sir. Just come down, or walk around, or whatever you see fit in order to identify them.

A. Well, they know me, too, some of 'em do.

(On looking them over, he points to one.) (He mutters to himself.)

The Court: Speak out. The Court Reporter cannot hear what is being said.

A. Sir?

The Court: The Court Reporter cannot hear what is being said, and I'm afraid the jury can't.

A. I remember these here specially, and to the best of my knowledge, they all look to be the same boys, I [fol. 1074] know specially this one here.

Mr. Maddin: Now, then, if the Court please, for the benefit of the record, he is pointing out what is known as the—

The Court: I think, if I am not in error, he points to defendants #3 and #4.

A. Those three right there. I am sure these three right here.

Mr. Maddin: Walk over here, so there will be no doubt, about the ones you identify.

A. Well, these three right here. I am sure about them. I am pretty well—

The Court: He identifies defendants #2, #3, and #4.

Mr. Maddin: All right. Now, then, I'll ask you to walk over in front of those four colored men sitting there, and see if you can recognize any of them.

Mr. Williams: May it please the Court, I object to this—

A. (Keeps on talking.) To the best of my knowledge, as I say.

Mr. Williams: —as being incompetent, and highly improper for Counsel to point to certain people and point at them and say, Walk over there in front of them, and see if they aren't some of the people.

The Court: No. I don't—don't do that. I don't believe he asked it that way.

[fol. 1075] Mr. Williams: It is incompetent, if your Honor please.

The Court: If there are any of the other people seated at the table there that you can identify, you have a right to do that, sir.

A. Well, like I said, just to be positive about it, I—I—can't be sure.

The Court: If you can't identify any of them—

A. To the best of my knowledge, it is them three—

The Court: —come back and sit down.

A. But I believe all of them,—

The Court: Well, now, all right, you mustn't believe—

A. No.

The Court: Now—now—now—let's be—let's keep the record right.

A. Yeah.

The Court: You can only identify three?

A. Well, specially, and to the best of my knowledge—

The Court: Well—well—you either identify—there is no special identification.

A. Well—

The Court: You either identify a person, or you don't.

[fol. 1076] Mr. Maddin: Let me ask a question in this matter, if I may, if your Honor please. Mr. Williams, to the best of your knowledge, state which, if any of the 8 persons who were in the vestibule on October 21, 1962, as you described, are in the courtroom now?

A. Well, to the best of my knowledge, they are, I'll say that.

Q. How many of them?

A. 8 of them.

Q. Where are they sitting?

A. Huh?

Q. Where are they sitting? Where are they?

A. I didn't understand you.

Q. Where are they sitting?

A. Lined up over there. (Waves his hand toward the table where defendants are seated.)

Reporter: I can't put that down. It doesn't mean a thing.

The Court: He said lined up over there, and I take it—pointing to—

A. I mean those right there,— (He waves his hand in a big wave again.)

Mr. Maddin: Mr. Williams, I am going to ask you to come down and point specifically at the ones you are talking about now.

Mr. Williams: If your Honor please, that is objected as being highly irregular and incompetent.

The Court: Well, I don't think it's necessary to do that [fol. 1077] now,—he's said—

Mr. Maddin: Well, I don't want to confuse Counsel in this. As it is, if he is confused, I'd want to know.

Mr. Williams: Counsel is not confused at all, if your Honor please.

The Court: All right. Have a seat, sir, he won't need to do that. He's already said.

Mr. Maddin: All right.

The Court: That won't be necessary.

A. I don't want to say anything that is wrong. I just want to say what I know.

The Court: Don't—don't—you answer the questions. You are sworn to say nothing but what's right.

Cross examination.

By Mr. Williams:

Q. Mr. Williams, how much do you weigh?

Mr. Maddin: If your Honor please, it is quite obvious Counsel is not speaking loud enough, for the witness to hear.

A. Huh? I didn't understand you.

Mr. Williams: How much do you weigh?

A. Weigh?

Q. Weigh? How much do you weigh?

A. 140.

Q: And how tall are you?

A. 5' 11".

[fol. 1078] Q. You are a very slender man, are you not?

A. Well, I don't know quite how you put that. I'm a pretty good man for my size.

Q. Yes, but you don't have much weight on you, do you?

A. Naturally, I've got 140 pounds.

Q. And you are 5 feet 11? How old a man are you, Mr. Williams?

A. Soon be 65.

Q. And you were 64 years of age last October?

A. No. Not October.

Q. How old would you have been?

A. It was in June, the 19th was my birthday. That was October when I had trouble with this.

Q. Well, how old were you then, when what you have related happened?

A. I told you I was 64 in June.

Q. 64? All right.

Now, these Negroes who were in the vestibule there—were they old or young men?

A. They was young men.

Q. Young men?

A. Yeah, I reckon. Thar they are. You can judge that.

[fol. 1079] Q. Would you say they all were under 25?

A. I wouldn't say that. I would just say they were young men.

Q. Well, would you say that all of them were under 30?

A. Yes, sir. I think so. I believe so. I couldn't say for sure, but I couldn't tell about colored people. I can white people.

Q. Now, you have testified that, before I get to that, did you have a lock on those doors that you were holding?

A. I had it on there, but it wasn't locked. We tried to lock one of them and we couldn't. They would push it every time the pin would go up in there. Me and Mr. Carrier both couldn't lock it.

Q. You had it locked?

A. Yeah, we locked it at different times, but not that time. We couldn't.

Q. Now, Mr. Williams, how were these young men situated?

A. How what?

Q. In the vestibule? These young men?

A. How were they what?

Q. How were they standing in the vestibule?—

[fol. 1080] A. I just don't know what you mean, but they were trying to get in the door,—in the place, that's all I know.

Q. Yes, sir. How were they standing? Were they standing one behind the other?

A. No. Well, they was all the way over the whole place there. The doorway at times, and at times they was just scattered amongst these people—just all—

Q. Sir?

A. But when they was trying to come in the door, when I would open it for somebody then the others would push in. They got one plumb inside one time, and me and Mr. Carrier overpowered him and put him back out.

Q. Well, you measured the place, didn't you?

A. I sure did.

Q. It isn't but 6 feet wide.

A. That's all. 6 feet 4 wide.

Q. 6 feet—

A. 4 inches wide.

Q. It would have been impossible to be right there at the door—all of them—wouldn't it?

A. There was so many at the door and so many behind them—

[fol. 1081] Q. Yes?

A. That's the way it was.

Q. As a matter of fact, they were lined up on each side of the vestibule, were they not?

A. They's all over it. Never did line up till the officers lined them up. After we stayed there a good while and worried with them, like we did, the officers lined them up and over to the side where we could let these people in and out, and in the meantime, we lost a world of customers that just left. They just couldn't get through there, and wasn't going to plow through them like that.

Q. Were you standing there watching them all the time?

A. Standing right there. You bet I was watching them.

Q. All the time?

A. That's right, every minute.

Q. And it is your testimony that they never did line up till the officers lined them up?

A. Not over to the side where we could let the people in and out. They was all over the place there,—

Q. All right.

A. —pushing one another,—anything to get through the [fol. 1082] door.

Q. Now, is it your testimony that they were pushing against that door? And you had to keep them out by brute force?

A. Me and Mr. Carrier, both.

Q. Well, was Mr. Carrier there all the time?

A. He wasn't at the first.

Q. Oh, how long were you there without Mr. Carrier?

A. I wouldn't know. I didn't count it. I tole them to go and git him, just as well—just as quick as they could, and he come right to me.

Q. Well, was it as much as say, 10 minutes?

A. I don't know. I wouldn't say that. I didn't count it.

Q. Well, you don't—

A. I had my hands full keeping them out.

Q. You don't have any estimate at all?

A. They didn't never get my arm pushed loose from them doors because I was laying with them doors.

Q. Now—

A. And I never left that, because I was needed right there.

[fol. 1083] Q. You are telling the Court and jury that all 8 of them were in that vestibule pushing against that door, and it was not locked, and you kept them out?

A. I didn't say they's all pushing the door at all. I said they was all in there, and that some of 'em was a-pushin' these that was a-tryin' to come in the door.

Q. Well, which ones of them were pushing trying to come in the door?

A. Well, there's one of 'em right over there.

Q. Well, how—

A. There's two of 'em, matter of fact.

Mr. Maddin: Mr. Williams, come down here and point to them where they can be identified.

A. —in the corner there. Them two that I identified.

Mr. Williams: May it please the Court, learned Counsel will have a chance to direct the witness on redirect examination. I respectfully object to him doing that, if the Court please.

The Court: Yes, sir, sustain the objection.

Mr. Williams: Yes, sir.

The Court: Let Counsel examine the witness, cross-examine the witness, now.

Mr. Williams: I repeat, how many were pushing against the door?

[fol. 1084] A. I don't know how many was pushing. There was only the one—see, we was just operating one door to let people in and out.

Q. Mr. Williams, you haven't answered my question. You can explain after you answer the question. You don't know how many? Is that correct?

A. Yes, I know how many was there, but I don't know how many was pushing, because they's all back through there. The ones right up here in front was trying to get in, was the ones I was a-holdin' back.

Q. Mr. Williams, I asked you—

A. (Has been continually talking while Mr. Williams (attorney) tries to question him.) The ones behind there were pushing as much as possible. I know they were pushing. They were pushing the white people, about as much as they was one another.

The Court: Let me say this. You are making it mighty hard on the court reporter—two of you talking at one time.

Mr. Williams: I tried to stop when the flow started, your Honor.

The Court: I am sure that she can't hear, and I am having difficulty hearing both of you, so I just admonish you—[fol. 1085] excuse me for interrupting, but—

Mr. Williams: Well, if your Honor please, it is sort of like Longfellow's brook, you ask one question and it flows—

The Court: Go ahead. All right. I am sorry to interrupt, gentlemen, but I thought that needed saying.

Mr. Williams: I will try to bear that in mind.

The Court: I thought Mrs. Cummins would like to hear me say it.

(Reporter nods thanks.)

Mr. Williams: Mr. Williams, as a matter of fact, you don't know how many people were pushing the door and trying to get in, do you?

A. Certainly I know how many was pushing up at the door. But I don't know how many was pushing back behind the door.

Q. You say there were white people in the vestibule?

A. Yes, but—there was white people in there, but they wasn't pushing the door—they was just pushed in there with them, trying to push them back there against the wall.

Q. Well, the white people were behind them, weren't they?

A. No, they was on this side over here, and right next to the outside door where they come in the door back there, and it was full from there on up to me.

Q. When you say on this side, what side are you talking about—the side of the vestibule?

[fol. 1086] A. As you come in the front door—

Q. Yes?

A. —it would be on the righthand side, and these white

people was, and these other boys come in on the left hand side coming in, and just rushed right in with these people all at the same time before I seen them. Well, all I could do was just grab the doors and keep out everybody—white people and all.

Q. Right? You closed the door to keep all of them out?

A. No, I didn't do that to keep all of 'em out. I done that to keep all the colored people out.

Q. Yes?

A. I could have opened the door and let the white people come in, but they'd a-come in, too.

Q. And you had to keep the white people out to keep the Negroes out?

A. At that present time, yes.

Q. And the white people were there trying to get in, too?

A. They wasn't a-tryin' to get in at all. They was just standing there. They didn't know what to do. Till got help there with Mr. Carrier and got him to help me manage it so we could open it and let them in one at a time, or let one out at a time, then they was pushed up against the wall and up against the doors, and a lot of them said they was going home, that was in there, and wasn't coming back. And they went back out and left. Said they just [fol. 1087] wasn't going to put up with nothin' like that.

Q. Are you through, Mr. Williams?

A. Go ahead.

Q. Now, there were many white people who got in there, weren't there?

A. Several, yeah, there was several of them in there before they got there.

Q. Well, you let them in, didn't you?

A. I shore did, and I'll let 'em in agin. That's my job.

Q. Yes?

A. The white people.

Q. Yes, sir. You had orders from Mr. Carrier not to let any Negroes in there?

A. That's right.

Q. As a matter of fact, that was the purpose of your job, was it not?

A. That was my job, that's what I told you. I didn't—here's what—let me say this, please. I don't hold one thing

against colored people in their place. I like them as good as anybody,—it ain't that at all, but my job was that I was to manage and not let them in there, and that's exactly what I done.

Q. Just so long as they stay in the dog kennel that is all [fol. 1088] right?

A. Now, that is out of the question.

Q. He brought that up.

The Court: Mr. Witness—Yes, I am afraid that he is right this time. Mr. Williams, I will admonish you that if you will save all of us time and do us a fine favor if you will just answer counsel's questions and just tell him the answers to the questions. All this volunteer information is probably sometimes not what is pertinent and relevant.

Mr. Williams: That is what you were hired for to keep all these Negro patrons out? Is that right, or not?

A. That's right.

Q. Now, as you let these white people in, did you lock the doors each time?

A. What was that, now?

Q. As you would let a white person in, through these Negroes, would you lock the door every time you let the white person in?

A. Not when these was in there, I didn't—but I have had set-ups that I'd have to do that—lock the door and then unlock it and let the people in and then lock it back—when they was outside on the sidewalk.

The Court: That's what I am talking about. Any time [fol. 1089] except Sunday, October 21, 1962, please.

Q. Were your orders when people came there to lock the doors and let only white people in?

A. No, my orders was to lock the door if they come and if I could, but I didn't have no chance to lock it. They got in before I had a chance to lock it.

Q. Well, they were just pushing the door just like any white person would at a restaurant, and when you pushed the door back, there were so many people there that you couldn't get the door all the way back, is that it?

A. No. That wasn't it.

Q. Well, they just—

A. I just held the doors together so they couldn't come in. They tried to push me in. And they had the doors swayed back in my arm, and I still had holt of the door till I got help.

Q. Well, even after Mr. Carrier came, you still held the door then, didn't you?

A. He hope me.

Q. Sir?

A. He hope me hold it. He helped me push them back, too. He pushed them back several different times.

Q. Mr. Williams, did you know that these Negroes—persons who were there in the vestibule—had you heard them [fol. 1090] discuss anything about non-violence?

A. You mean heerd the colored people?

Q. Yes?

A. Discuss how nice?

Q. Had you heard them discuss anything about non-violence?

A. I haven't—I haven't talked with them.

Q. You haven't talked with them at all?

A. Not since that, except just to speak to them. They come to me out there, and told me they knowed me.

Q. Do you know anything about the non-violence movement among Negro college students?

A. If I did, I don't know too—anyway.

Mr. Maddin: I object to that. Whether he does or doesn't, does not matter any way.

A. I don't know too much about them any way.

The Court: He says he does not. He says he doesn't know.

Mr. Williams: Mr. Williams, you testified on direct examination that you told them that they couldn't come into the restaurant—is that correct?

A. I told them, Oh—they said they's a-comin' in and they's going to eat, and I said, No, you ain't going to do either one while I'm here at the door.

Q. Well, there were some white people standing there, [fol. 1091] too?

A. That's right.

Q. Who were you talking to?

A. I was talking to the colored people, of course.

Q. Well, how would anybody have known who you were talking to there?

A. They knowed the rules. Them white people. They had eat there before. They knowed what I was talking about.

Q. They knew the rules?

A. That's right.

Q. You just assumed the Negroes knew the rules?

A. Yeah, that we just served white people. That's all.

Q. And these Negroes said, we are coming in to eat.

A. That's what they said.

Q. And that was what they did?

A. Well, that was all that was necessary.

Q. And you think they knew the rules and restrictions?

A. Yes.

Q. You were also serving the public that day?

A. Yes, except the colored people.

[fol. 1092] Q. Anybody could come in and buy a meal there and you could be glad to have them unless accidentally they were Negroes—this racial restriction—unless you could identify them as Negroes?

A. If they were drinking, or out of order, they would be turned away, same as that.

Q. That would be done anyway?

A. Yes.

Q. Anybody who came in and behaved himself properly, and looked and acted like a gentleman, would be admitted unless you could determine he was a Negro? An American Negro?

A. I don't know nothing about an American—I don't know anything about an American—

Q. Well, do you have any instructions about any foreign Negroes?

A. I don't know where they're from.

Q. You don't have any instructions?

A. I just know they're Negroes. Of course that's all I know about them.

Q. Did you have any special instructions about Japanese or Chinese?

A. How's that?

Q. Did you have any special instructions about either Japanese or Chinese people, that color of people.

A. That's what they said they were anyway.

Q. You would accept them anyway? It would be all right for them to come?

[fol. 1093] A. It's the boss' instructions—not mine.

Q. Well, did you have any so-called instructions about Japanese, or Chinese, or Africa,—didn't have any special instructions about that, did you?

Did you have any special instructions about Japanese or Chinese? Any special instructions about alien Japanese, or Chinese, or colored people?

A. They's been Chinese, at least that's what they said,—I don't know.

Q. Sir?

A. That's what they said they was.

Q. Is it all right for them to come?

A. We accepted them anyway.

Q. Under the boss' rule?

A. I am working for them. Negroes is the only thing they don't serve.

Q. And it is all right for a native Japanese, or native Chinese—they could be admitted,—

A. I don't know about that—about them, but

Q. Well, the boss didn't give you any instructions to ascertain whether a Japanese person showed up? Or an alien Japanese? Or—

A. They are not considered Negroes.

Q. Sir:

A. They are not considered Negroes. They are considered Japanese.

Q. I asked you—

[fol. 1094] A. I'm talking about Negroes.

Q. If an Indian showed up there, an East Indian, or someone, why you weren't required to turn them back either, were you?

A. I don't know about that. Wasn't nothing said about that.

Q. You don't have any instructions about that?

A. The only thing that I am required to do is to not let colored people in—Negroes.

Q. How was that?

A. Wasn't anything said about any other race at all.

Q. Just the American Negro.

A. I don't know nothing about the American Negro

Q. What about an African Negro? If the African had on a turban, would you have admitted him?

Mr. Maddin: I object to that, if your Honor please.

The Court: I think you have got enough of that in the record now. You've got it. Let's get on to some other—something else.

Mr. Williams: Mr. Williams, I will ask you this: in order—you say that in order for the white people to get in there, they had to push through these Negroes standing there?

A. What few I let in while they had them in there, did, yes. They had to just crowd their way by them.

[fol. 1095] Q. Well, how do you know—I thought you said that those white people didn't do any pushing in there.

A. They didn't do any pushing to get in, to get in the door. Just to get by them. I opened the door for them.

Q. Well, these people weren't standing all over the floor then?

A. Practically all over the place. Some of them were trying to come over my arm and under my arm while I was holding the door till I could get a chance to let a lady in, or a man.

Q. But they weren't standing entirely all over the place because the white persons had a chance to push through there, didn't they? If they had been, a white person would have had—

A. There didn't nobody do that. It was when—

Q. —to push them, wouldn't they?

A. —when we could get a chance to move them to get one by.

Q. Then they weren't—well, you were already on the—inside?

A. I was. How was that?

Q. Weren't you on the inside, Mr. Williams?

A. I was, facing everybody.

Q. You never did go into the vestibule, did you?

A. No, but there's people in there that's movin' from one [fol. 1096] door to the other. Trying to get in.

Q. They did move from side to side? Now, you are saying, as a matter of fact, that they did move from side to side?

A. They was moving. They wasn't all standing still in there. They was trying to get in any way in the world they could get in. That's what they're doing.

Q. Was there ever a time when the aperture of that door that you were holding was not completely covered by a line of Negroes across there?

A. These white people—now, get this straight—these white people—just take this lady here, and all them men there, she's comin' in—well, they parted the way theirself because they was ambitious to try to get in, and they would pursue them to try to get through the door, when we'd let them,—why they'd grab right over them, and try to get in too and push her up agin the door—this way, or that way, or just any way in the world.

Q. Well—

A. And the only thing—that was the only thing they wasn't nice about.

Q. Well they had to push? They had to stand back to let the white people in, didn't they?

A. They had to be pushed by the white people and the door—pushed back.

Q. You are saying that the white people would come from [fol. 1097] the back and push them back to the side?

A. I didn't say they pushed them to the side at all. I just said they pushed them aside to get to the door. What few people did get in—till they got them away. There was very few that got in while they were there. Or out, either. There was a lot of people inside missed the bus, on account of it.

Q. As a matter of fact, they did move back as the white people came in, didn't they?

A. No, they didn't move back, at all. They were pushed back.

Q. They were pushed back.

A. They—

Q. Pushed back?

A. They was crowded through—just what few white people there that got in just had to push their way through them to get through the door.

Q. You mean they just came—the white people just came through?

A. No,—

Q. They pushed them aside with brute force, and came on in?

A. They did sometimes just give 'em enough room to crowd between them, that was all.

Q. Well,—

A. They didn't like to do that. That wasn't decent for a lady to do.

Q. Mr. Williams, will you explain to the Court, how you [fol. 1098] were able to—how *you* were able to keep 8 Negroes out of the restaurant through an open folding, French-type doors, when as you say they were trying to get in and they just pushed on it all the time and you let the white people in.

A. Well, we'll put it this way. I had both doors. Well, if they—they knowed how much they was supposed to do. If they had put their full force to it, and got ambitious about it, why somebody else would have had to, too. They knowed that I had them doors, and they was trying to come in, but still they weren't fighting their way in. That would have been different if they had.

Q. As a matter of fact, now—

A. They was wanting in, but not wanting to fight to get in.

Q. They were peaceable and trying to come into your restaurant, weren't they, Mr. Williams?

A. They were trying their best to come in.

Q. They were peaceable, weren't they?

A. I guess they could have fought their way in, and come in.

Q. But they were doing it in a peaceable manner

Mr. Maddin: Well, that all calls for a conclusion, if your Honor please.

Mr. Williams: No, it doesn't, your Honor.

The Court: If he can answer it, I'll let him do it.

[fol. 1099] The Court: If you can answer that, you may.

A. I don't know what he means by it. I don't know how to answer.

Mr. Williams:

Q. Well, you knew how to say they were shoving?

A. Shoving?

Q. You said they had to be shoved aside, didn't you?

A. They crowded—

Q. They had to be shoved aside? Not one of them punched anybody in the nose, did he?

A. No, or there would have been more punching.

Q. If they had punched anybody in the nose, did you have a weapon on you?

A. No.

Q. A knife?

A. No, sir. I didn't need one. I didn't—I ain't out for that. I am out to treat everybody with courtesy.

Q. Yes, sir, and they were there peaceable and trying to enter that restaurant in a peaceable manner? Were they not?

A. Well, I don't know whether you would call it that, or not, but I thought they were a little brutish myself.

Q. Sir?

A. I thonght they was a little brutish about that pushing and shoving these women around and knocking them up against the doors. I don't think that was decent of anybody. [fol. 1100] Me, or you, or anybody else.

Q. Well, now, who pushed whom?

A. I don't know who. I don't know the names of who pushed who. But the ones at the door and the ones behind and these here three was mostly the ones that was a crowdin' for the door, and one of them got inside,—

Q. You say—

A. And me and Mr. Carrier overpowered him, and put him back.

Q. Now, you said brutish. Did anybody get bruises on them there, Mr. Williams?

A. I don't know what you call it, but that is the way I look at it. Knocking these women about like that. Of course,—

Q. You say one of these people did get in and you pushed him back?

A. Me and Mr. Carrier. He got inside the door, and we overpowered him and pushed him back.

Q. You didn't do that gently did you?

A. Yeah, we done it as nice as we knowed how.

Q. But you did it gently in an effort to get him back?

A. We just tuk holt of him and put him back, and we told him, You don't belong in here. We don't serve you in here, and you're not comin' in.

[fol. 1101] Q. As a matter of fact, the only thing that was done up there that was brutish there that afternoon—well, let me finish my question—Mr. Williams—

(Mr. Williams is shaking his head.)

—before you start shaking your head. Let the record show that he is shaking his head before I finish my question, even ask the question.

The Court: Let him finish his question, Mr. Williams.

Mr. Williams: As a matter of fact, Mr. Williams, the only thing that was done brutish that afternoon was taking hold of them and manhandling them by you, and Mr. Carrier was the man who told you not to let them in the restaurant?

A. We didn't manhandle them. We just took hold of them and pushed them back. That's right.

Q. It took both of you together to push them?

A. Yes. Yes. They's pushing that way and we's pushing them. We was pushing him back.

Q. One more thing. Haven't you got a back door to that restaurant, Mr. Williams?

A. Yes.

Q. And that back door is for use of the patrons is it not? It's for use of people coming to the restaurant?

A. Yeah, more for the salesladies and people like that.

Q. It is frequently used by the people who come from [fol. 1102] church, isn't it? That's right, isn't it?

A. The church people—the majority of them come to the front door. It isn't usually open on Sunday. And if it is, it is for some occasion. It's for—

Q. It was open that day, wasn't it?

A. Not that I know of.

Q. You don't know that people came in the back door that day?

A. I don't know cause I wasn't back there.

The Court: Now, if you don't know, just say so.

A. I don't. I don't know.

The Court: That's right. When you don't know, just tell us so.

Mr. Robinson: That concludes the state's case in chief, your Honor.

The State Closes Its Case.

(Recess is had from 11:08 to 11:33, after which the Counsel for the Defendants announce that they too close their case.)

The Defense Rests.

This Was All the Evidence Adduced Upon the Trial of This Case

Summations:

Special Counsel for the State: John K. Maddin, Jr.

For the defendants: Avon Williams, Jr., Z. Alexander Looby

For the State: Gale Robinson

[fol. 1103] Reporter's Certificate to foregoing transcript (omitted in printing).

[fol. 1104]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

CHARGE OF THE COURT

By the Court:

Gentlemen:

This is the case of the State of Tennessee vs. Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr.

This is the charge of the Court:

Members of the Jury:

The presentment in this case charges the defendants with the offense of unlawful conspiracy in violation of Code Section 39-1101, and is in words and figures as follows:

STATE OF TENNESSEE, DAVIDSON COUNTY

SEPTEMBER TERM OF THE CRIMINAL COURT, 1962.

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn, and charged to inquire for the body of the County of Davidson and State aforesaid, upon their oath aforesaid, present:

That Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., heretofore, to wit, on the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms, in the County aforesaid, unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant

business, trade and commerce of Burrus and Webber Cafe-
[fol. 1105] teria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, in the following manner and by the following means, to wit:

On the day and date aforesaid, and for many months and years prior thereto, the said Burrus and Webber Cafeteria, Inc., had built up and established a restaurant and cafeteria, elaborately furnished and equipped, known as the B & W. Cafeteria, located at said address in the heart of the business, commercial and uptown district of Nashville, Tennessee, in a building fronting on the east side of 6th Avenue North, and extending back to the westerly margin of an alley in the rear, which dining room and cafeteria had two long cafeteria lines, dining tables and chairs on the mezzanine level, with a large seating capacity for customers, patrons and clientele of said B & W. Cafeteria, which had established itself by reputation as serving fine foods, and which said cafeteria daily served hundreds of white patrons, customers and clientele.

The entrance from said 6th Avenue North into said cafeteria is effected by a double door at the northwest corner of said cafeteria, which leads into a vestibule, small in area, with a second set of double doors on the east side of said vestibule; all customers of said cafeteria enter and leave through said vestibule.

The owners of said cafeteria and restaurant, which was privately owned, had established a rule that would receive, admit and serve only such persons as customers, patrons and clientele as said corporation elected to admit, receive and serve in said cafeteria; and said Burrus and Webber Cafeteria, Inc., had reserved the right to control the access and admission or exclusion of persons to said cafeteria as the owners deemed proper, in their discretion as the owners of private property; and under the provisions of Section 62-710 of the Code of Tennessee, the owners of said cafeteria reserved the right not to admit and to exclude from said cafeteria any person the owners, for any reason whatsoever, chose not to admit or serve in said cafeteria.

Among the rules established by the owners of said B & W Cafeteria was one that they would serve food only to persons of Caucasian descent, or white persons, and not to serve food to persons of African descent, or colored persons; and said B & W Cafeteria was known to the general public as a cafeteria and dining place, privately owned, serving food only to white persons.

In the said City of Nashville at said time there were numerous other dining rooms, restaurant, cafeterias and [fol. 1106] places serving food, some of which served food only to colored persons, and some serving food to both white and colored persons, known as "integrated" restaurants, dining rooms, cafeterias and food places, many of which were in the immediate vicinity or within a few blocks of said B. & W. Cafeteria, all of which was then and there well known to the defendants, hereinbefore named; and on said October 21, 1962, food was available to said defendants at numerous eating places in Nashville in the general vicinity of said B & W Cafeteria.

The said defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., are persons of African descent or colored persons; and said defendants unlawfully, wilfully, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to conduct what is known as "sit-in" affairs, by going to divers restaurants, dining rooms and cafeterias well knowing that only white persons were being or would be served, and further well knowing that colored persons would not be served food therein; and after being denied entrance thereto and after being denied food service, and after being requested to leave such dining rooms, restaurants and cafeterias, the said defendants did conspire to block the entrance or vestibule of said B & W Cafeteria to prevent customers, patrons or clientele from entering, and to block or prevent those already therein and who had been served food and had finished their meals from leaving said cafeteria by means of the only regular entrance or exit thereto, being the above described vestibule, all being contemplated to

be done, well knowing that their presence as "sit-ins" was likely to promote disorders, breaches of the peace, fights or riots by patrons, customers and clientele of such segregated cafeteria;

And the said defendants, on said October 21, 1962, well knew that prior or similar acts of "sit-in" in Nashville had resulted in fights, breaches of the peace, disorders, brawls and riots previously, requiring the calling of police and peace officers to quell conditions resulting therefrom, as at least one of the defendants herein named had previously participated in several of such "sit-ins" conducted at other dining rooms and restaurants in Nashville prior to October 21, 1962.

The said defendants are college students and are strong advocates of an integration movement now being conducted in Davidson County, Tennessee, and are engaged in a movement to coerce, compel, and to intimidate owners of restaurants, dining rooms and cafeterias serving only white persons to "integrate", or to admit and serve food to persons of African descent or colored persons against [fol. 1107] the wishes, rule and established policy of the owners of such segregated restaurants, dining rooms and cafeterias.

As an overt act in the furtherance of said unlawful conspiracy, on Sunday, October 21, 1962, shortly after noon, when the said B & W Cafeteria was engaged in serving food to numerous customers, patrons, and clientele, and while many persons were coming in and out of said cafeteria, the said defendants did assemble at a point near said cafeteria, and then as a group did go to the 6th Avenue door of said Cafeteria, and did enter into said vestibule, with intent to go through the second doors of said vestibule, and to enter one of the serving lines within said cafeteria in an effort to obtain food and service therein;

At said door the owners of the B. & W. Cafeteria had placed a guard to prevent such "sit-in" movement; said guard was compelled to block the further entrance at the second door; whereupon said defendants did form a block within said vestibule, preventing customers and patrons

from either entering from the street or from coming out of said cafeteria after finishing their meals; and said conspirators did further attempt to force their way inside the main cafeteria sections, did push around and shove white patrons therein, which conduct continued for a period of more than thirty minutes during one of the busiest hours of business at said cafeteria; and as a further overt act in the furtherance of said conspiracy, said defendants did refuse to leave said vestibule and cafeteria when requested and demanded by proper officers and employees of said cafeteria.

During said period of time so spent by said defendants in said vestibule, said defendants knowingly, deliberately and intentionally did place said B & W. Cafeteria and the persons lawfully therein in excitement, turmoil and confusion; the orderly conduct of the business of said cafeteria was greatly upset, disrupted and obstructed; numerous persons gathered within and without said cafeteria by reason of said acts and conduct of the defendants, which said defendants then and there well knew were calculated to produce disorder, breaches of the peace, confusion, brawls and turbulent and riotous conduct, and which was done by said defendants with a view to commit acts injurious to the business of the B. & W. Cafeteria, its trade and commerce, which was injured therefrom;

Contrary to the form of the statutes in such cases made and provided, in violation of Section 39-1101 of the Code of Tennessee, and against the peace and dignity of the State of Tennessee."

[fol. 1108] To this presentment, each defendant has entered a plea of not guilty.

In the trial of all criminal cases the law distinctly defines the duties incumbent upon the Court and upon the Jury. It is the duty of the Court to give in charge to the Jury, clearly and distinctly, the law applicable to the case on trial.

In criminal prosecutions you are the judges of the law and the facts, and it is your duty to take the law as it is laid down to you by the Court and apply the law and the facts to each other. You are the sole and exclusive judges of the facts, of the credibility of witnesses and the weight

to be given their testimony. You will try the case on the evidence which has been admitted for your consideration by the Court, and if any juror has heard any facts in regard to the case before he was taken on the Jury, or in any other way than under the direction of the Court, it would be highly improper for him to impart such fact to his fellow jurors or consider it in making up his verdict.

The duty of the Jury is equally well defined. It is the duty of the Jury to carefully consider all the facts and circumstances related to them by the proof with an eye single to truth and justice; and, after carefully considering all the evidence, make and report to the Court such verdict as they think truth and justice dictate. In the discharge of [fol. 1109] their duty the Jury should never have any sympathy or prejudice, but should always act with absolute impartiality and, under the law as given to them by the Court, render their verdict. The rules which should govern the Jury in arriving at their verdict will be more fully given in the subsequent part of this charge.

Without reference to the facts in this particular case, I shall proceed to explain to you what in law it takes to constitute the offense as set out in the presentment which charges the defendants with the offense of unlawful conspiracy to violate Tennessee Code Section 39-1101 (7) and Code Section 62-711 and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

Section 39-1101 of the Code:—Conspiracy defined.

> "The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce, or for the perversion or obstruction of justice, or the due administration of the law."

Section 39-1102 of the Code provides as follows:

> "No agreement shall be deemed a conspiracy unless some act be done to effect the object thereof, except

an agreement to commit a felony on the person of another, or to commit the crimes of arson or burglary."

Section 39-1103 of the Code is as follows:

"Persons guilty of any conspiracy described in Sections 39-1101, 39-1102 or of any conspiracy at common law, [fol. 1110] are guilty of a misdemeanor."

Section 62-710 of the Code of Tennessee provides as follows:

"The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family."

Section 62-711 provides as follows:

"A right of action is given to any keeper of any hotel, inn, theater, or public house, common carrier, or restaurant against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars ($100), and the offenders

shall be liable to a forfeiture of not more than five hundred ($500) dollars, and the owner or persons so offended against may sue in his own name for the same."

You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101-(7), Code Sections 62-710 and 62-711, in that they did unlawfully com- [fol. 1111] mit acts injurious to the restaurant business, trade and commerce of Burrus & Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

The offense of conspiracy as charged in the presentment is a misdemeanor.

Our Supreme Court in defining a conspiracy says:

A conspiracy is, in general terms, a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose.

A conspiracy is an agreement between two or more persons to do an unlawful act. If the act to be done is not unlawful, then the agreement or combination is not a conspiracy.

When the conspiracy is established, the act or declaration of one conspirator in the prosecution of the common enterprise, is considered the act or declaration of all, and is evidence against all.

And every one entering into a conspiracy is a party to every act which has before been done by the others, and to every act by the others afterward, in furtherance of the common design.

A conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy.

[fol. 1112] The mere knowledge, acquiescence, or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute one a party to a conspiracy. There must be intentional participation in the transaction with a view to the furtherance of the common design and purpose.

No formal agreement between the parties to do the act charged is necessary. It is sufficient that the minds of the parties meet understandingly so as to bring about an intelligent and deliberate agreement to do the acts and to commit the offense charged, although such agreement is not manifested by any formal words, or by a written instrument. A mutual implied understanding is sufficient, so far as the combination or confederacy is concerned, to constitute the offense. If two persons pursue by their acts the same object often by the same means, one performing one part of the act and the other another part of the act, so as to complete it with a view to the attaining of the object which they are pursuing, this will be sufficient to constitute a conspiracy. Previous acquaintance is unnecessary, and it is not essential that each conspirator shall take part in every act, or that he shall know the exact part to be performed by the other conspirators in execution of the conspiracy. Conspiracy implies concert of design and not participation in every detail of execution.

In order that you may understand what a conspiracy to commit an offense is, you must first know what the [fol. 1113] offense itself is, therefore, I give you the definition of acts injurious to restaurant business, trade and commerce.

The word "injurious" generally means in law, invasion or violation of legally protected interest or property right of another.

The words "trade" and "commerce" when used in juxtaposition, impart to each other enlarged signification, so as to include practically every business occupation carried on for subsistence or profit and into which the elements of bargain and sale, barter, exchange, or traffic, enter.

Members of the Jury, from the definition of a conspiracy heretofore given you in this charge, you will observe that a conspiracy is a combination of two or more persons, and that the very nature of the offense of conspiracy is such that it cannot be committed by one person, but that it takes two or more persons to commit the offense of conspiracy.

Members of the Jury, as hereinbefore stated to you, the declarations and acts of conspirators made in pursuance

of their common design are admissible against each other, but bear in mind, Members of the Jury, that only those declarations or acts made and done in pursuance of the common design by one or more conspirators are admissible against all, and those acts or declarations before the forming of the conspiracy and after the completion of the object of such conspiracy, are not admissible as the acts or declara- [fol. 1114] tions of any other than the person or persons actually committing said acts or making such statements.

Conspiracies need not be established by direct evidence of the acts charged, but may and generally must be proved by a number of indefinite acts, conditions and circumstances which vary according to the purposes to be accomplished. The very exstence of a conspiracy is generally a matter of inference deduced from certain acts of the persons accused, done in pursuance of an apparently criminal or unlawful purpose in common between them. The existence of the agreement or joint assent of the minds need not be proved directly. It may be inferred by the Jury from the other facts proved. It is not necessary to prove that the defendants came together and actually agreed in terms to have the unlawful purpose and to pursue it by common means. If it be proved that the defendants pursued by their acts the same object often by the same means, one performing one part and another, another part of the same, so as to complete it with a view to the attainment of the same object, the Jury will be justified in the conclusion that they were in a conspiracy to effect the object.

I charge you further, Members of the Jury, that under our statute where it is necessary that some act be done to effect the object of the conspiracy before any agreement shall be deemed a conspiracy, such overt act must be a subsequent independent act following the agreement or confederation and must be committed to effect the object thereof and cannot succeed the completion of the contemplated crime, [fol. 1115] and where a presentment charges several overt acts, it is not necessary that all be shown. It will be sufficient to show that one or more of these acts were committed in furtherance of the conspiracy.

Nor is it necessary that all of the conspirators should have joined in the overt act. While to authorize a conviction of

several persons charged in one presentment with conspiracy, each must be proved to have come into the conspiracy prior to the consummation of the act to be done in pursuance thereof, but it is not essential to the conviction of a person or persons charged with a conspiracy, that he or they should have originated the conspiracy. All who accede to a conspiracy after its formation, and while it is in execution, and who with a knowledge of the facts concur in the plans originally formed and aid in executing them, are fellow conspirators.

The crime of criminal conspiracy is separate from the criminal act which the parties may agree to commit. It is not necessary to the completion of the crime of criminal conspiracy that the criminal act which they agreed to perform actually be performed, but merely that some act shall have been done by one of the members of the conspiracy in furtherance of its objects or purposes.

An overt act must be something more than evidence of the conspiracy. It must be an act done by one of the parties to carry out the intent, and it must be such as would nat-
[fol. 1116] urally effect that result; at least, it must be a step towards the execution of the conspiracy.

An overt act is some act done to effect the object of the conspiracy. The gist of conspiracy is an agreement to effect an unlawful end, but, before the offense is completed, a party to the conspiracy must do some overt act.

Members of the Jury, as just stated, it requires at least two persons to commit the offense of conspiracy, and so, in this case where the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr. are charged with conspiracy, if you find and believe beyond a reasonable doubt that the said defendants unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Tennessee Code Section 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North,

Nashville, Davidson County, Tennessee, as charged in the presentment, then it would be your duty to convict the defendants; provided, that they, or one of them, did, in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement; that is, if you find that said agreements and acts in the furtherance of said objec-
[fol. 1117] tive were done in Davidson County, Tennessee. Should you find and believe beyond a reasonable doubt that any two of the defendants did conspire and agree and confederate among themselves to commit the offenses set out in the presentment, and that either of them did some act in furtherance thereof, and that said agreements and acts to effect the objects of said agreement occurred in Davidson County, Tennessee, then it would be your duty to convict such defendants as entered into such conspiracy. If you should find beyond a reasonable doubt that one of the defendants did conspire and confederate with the others, as set out in the presentment, to commit the offenses therein set out, then it would be your duty to convict such defendant as did enter into such agreement; provided, that they, or one of them, did, in pursuance of said agreement, do some act to effect the object of said agreement and that it occurred in Davidson County, Tennessee.

If you have a reasonable doubt as to the guilt or innocence of either of the defendants, you should give to him, or them, the benefit of such doubt, and as to him, or them, your verdict should be not guilty.

Should you convict the defendants, or either of them, of the offenses as charged in the presentment; that is, a conspiracy to commit the offenses hereinbefore defined, it would be your duty to fix the punishment as set out in Section 39-105 of the Code of Tennessee which is as follows:

> [fol. 1118] "Every person who is convicted of a misdemeanor, the punishment for which is not otherwise prescribed by a statute of this state, shall be punished by imprisonment in the county jail or workhouse not more than one (1) year, or by fine not exceeding one thousand dollars ($1,000), or by both, in the discretion of the court."

So, should you convict the defendants, or either of them, of conspiracy to commit the offense as set out in the presentment, and should you believe that such defendant or defendants deserve a fine of over fifty dollars ($50), you will fix such fine in your verdict, which fine in no event can exceed one thousand dollars ($1,000). If you convict the defendants, or either of them, of unlawful conspiracy, and believe a fine of fifty dollars ($50) or less would be sufficient punishment, then all you need to say in your verdict is that you find the defendant or defendants guilty, and the Court will fix the punishment. You have nothing to do with the punishment by way of confinement in the Jail or Workhouse, if any, for that is within the discretion of the Court.

I further charge you that where two or more persons are jointly tried and convicted, and the punishment is within the discretion of the Jury, the Jury may, if they are of the opinion that justice demands it, fix the punishment of all convicted defendants at the same amount, and another or other at different amounts.

Where two or more persons are jointly indicted and tried together, it is your duty to carefully consider all the [fol. 1119] evidence as it applies to the guilt or innocence of each defendant as to the particular charge against him. Be careful in doing this that you do not let evidence which sheds light upon the guilt or innocence upon one defendant affect your verdict as to the guilt or innocence of another upon which this particular testimony sheds no light. As I have heretofore charged you, each defendant is to be tried upon the evidence that has been admitted for your consideration, and each defendant is to be tried as to his guilt or innocence upon the testimony which relates to that particular defendant. So, therefore, you could find all the defendants guilty of the offense charged, if you think the evidence justifies such verdict, or you could acquit all of the defendants if you are not satisfied that their guilt is established beyond a reasonable doubt, or you may convict such defendant or defendants if you are satisfied they have been proven guilty beyond a reasonable doubt and acquit such defendant or defendants whose guilt has not been established beyond a reasonable doubt.

Before any defendant can be convicted of unlawful conspiracy, you must be satisfied of his guilt beyond a reasonable doubt, and if you have a reasonable doubt as to the guilt or innocence of any defendant or defendants, it would be your duty to give such defendant or defendants the benefit of such doubt and not guilty as to such defendant or defendants should be your verdict.

You enter upon this investigation with the presumption [fol. 1120] that the defendants are not guilty of any crime, and this presumption stands as a witness for them until it is rebutted and overturned by competent and credible proof, sufficiently strong to satisfy you beyond a reasonable doubt that the defendants are guilty of the offense heretofore defined and explained to you.

By reasonable doubt is not meant that which of possibility may arise, but is that doubt engendered by an investigation of the whole proof, and an inability, after such an investigation, to let the mind rest easily upon the certainty of guilt. Absolute certainty is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense as charged in the presentment.

It must, therefore, appear to your satisfaction by competent and credible proof beyond a reasonable doubt before the defendants can be convicted; first, that the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean and Allen Cason, Jr., unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves to violate Tennessee Code Section 39-1101-(7) and Code Section 62-710 and 62-711 and unlawfully to commit acts injurious to the restaurant business, trade and [fol. 1121] commerce of Burrus and Webber Cafeteria, Inc., a corporation located at 226 6th Avenue North, Nashville, Davidson County, Tennessee. Second, that the offense occurred in Davidson County before the finding of the presentment. Third, that it was done in such manner and under such circumstances as to make the defendants guilty of the offense heretofore defined and explained to you.

You must not imagine that the Court has any opinion in regard to the facts, for it is your duty to find them, and I have attempted to read this charge so as to define to you the law without indicating any opinion about the facts whatever.

There are several means of impeaching a witness, one being to show by the proof that the witness has at different times made conflicting statements as to the material facts of the case as to which he testified. Still another mode is, by rigid and closs examination, to involve him in contradictions and discrepancies as to the material facts stated by him. Immaterial discrepancies or differences in the statements of witnesses do not necessarily affect their credibility unless there is something to show that they originate in wilful falsity, and you, Members of the Jury, are to determine how far the testimony of any impeached witness has been impaired by any contradicting process.

You will take all the evidence adduced by the State and [fol. 1122] by the defendants and give it a full, fair, and impartial consideration. If there are conflicts in the statements of different witnesses, it is your duty to reconcile them if you can, for the law presumes that every witness has sworn the truth, but if you cannot, the law makes you the sole and exclusive judges of the credibility of the witnesses and the weight to be given their testimony.

In forming your opinion as to the credibility of witnesses, you may look to the proof, if any, of his general character, the manner and demeanor of the witness, the consistency or inconsistency of his statements, their probability or improbability, his ability or willingness to speak the truth, his intelligence and means of knowledge, and his motive to speak the truth or swear a falsehood.

In any case where a person is indicted and tried, he has the right to take the witness stand in his own behalf or not, as he may elect. If a defendant elects not to testify in his

own behalf, then the Jury is not warranted in and must not draw any conclusion unfavorable to the defendant merely by reason that he elects not to testify.

Anything further from the state?

Mr. Nichol: Nothing from the state.

The Court: Well. There are some requests—

[fol. 1123]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO

DEFENDANTS' SPECIAL REQUEST NO. 1 FOR INSTRUCTIONS TO THE JURY

Before you can find any of the defendants guilty under this indictment, you must find from the evidence that two or more of the defendants named in the indictment together combined and agreed to do an act violative of the law, and that some overt act was done by the defendants in pursuance of such an illegal agreement. [Evidence that the defendants agreed to seek entry, or that they went to the premises and sought entry, to the B&W Cafeteria for the purpose of being served food, could not constitute such an unlawful agreement or overt act in pursuance thereof even though the defendants were Negroes and the B&W Cafeteria had a policy of refusing to serve food to Negroes, for] It is not a criminal offense in the State of Tennessee for Negro and white persons to be served food together, nor is it a criminal offense for Negroes to peaceably seek to be served food in a place which offers its services and facilities to the general public.

Looby & Williams, By [Signature Illegible], Attorneys for Defendants.

[Handwritten notation—Denied: Mar 9 1963—John L. Draper Judge]

State of Tenn.

vs.

Lester G. McKinnie, et als

Identified as defendants' special request #1 which was revised and as revised charged.

John L. Draper, Judge.

[fol. 1124]

DEFENDANTS' SPECIAL REQUEST NO. 2
FOR INSTRUCTIONS TO THE JURY

If you should find from the evidence that the defendants went to the B&W Cafeteria, a place of business offering meals to the general public, and sought to enter there for the purpose of purchasing and being served meals, and that said Cafeteria or its agents blocked their entry in pursuance of and for the purpose of enforcing, a rule of the Cafeteria to serve only white persons and not to serve Negroes, and that the defendants remained standing in a peaceable manner where they were when the Cafeteria blocked their entrance, either for the purpose of still seeking admission to the Cafeteria, or for the purpose of peaceably protesting the Cafeteria's policy of racial exclusion or segregation, then you could not find the defendants guilty of committing any unlawful act, nor could you find defendants guilty of a conspiracy or agreement to commit any unlawful act under this evidence, and this is true even though you also find from the evidence that it was necessary for some white patrons to pass through or around the defendants in order to gain ingress or egress to or from the Cafeteria or that some prospective white patrons may have been reluctant or may have refused, to enter, stay in, or come out of the restaurant because of the defendants' presence there.

Looby & Williams, By [Signature Illegible], Attorneys for Defendants.

[Handwritten notation—Denied: March 9 1963—John L. Draper Judge]

(Identified on back)

[fol. 1124a]

State of Tenn.

vs.

Lester G. McKinnie, et als

Identified as defendants' special request #2 which was denied.

John L. Draper, Judge.

[fol. 1125]

DEFENDANTS' SPECIAL REQUEST No. 3
FOR INSTRUCTIONS TO THE JURY

You will not consider or bring in any verdict as to that portion of the presentment which charges a conspiracy by defendants to violate Code Section 62-711, for the reason that the State has abandoned this portion of the charge, and has offered no evidence in support thereof.

Looby & Williams, By [Signature Illegible], Attorneys for Defendants.

[Handwritten notation—Denied—Mar 9 1963—John L. Draper Judge]

State of Tenn.

vs.

Lester G. McKinnie, et als

Identified as defendants' special request #3 which was denied.

John L. Draper, Judge.

[fol. 1126]

DEFENDANTS' SPECIAL REQUEST No. 4
FOR INSTRUCTIONS TO THE JURY

Notwithstanding Tenn. Code Section 62-710, or any statute or other law of the State of Tennessee, the B&W Cafeteria, or its proprietors, have no legal right to exclude persons from said business offering food service and meals to the general public, solely on account of the race or color of the persons so excluded, or to enforce or have enforced any private rule or policy of racial segregation or exclusion through criminal action in a Court of the State of Tennessee; for any state law which attempts or attempted to establish such a legal right, and any action of State agencies, including the Courts thereof, in enforcing, directly or indirectly, such a private rule or policy would be and is unconstitutional and void as depriving the defendants in this case of the equal protection of the laws and of due process of law as secured by the Fourteenth Amendment of the Constitution of the United States.

Looby & Williams, By [Signature Illegible].

[Handwritten notation—Denied—Mar 9 1963—John L. Draper—Judge]

State of Tenn.

vs.

Lester G. McKinnie, et als

Identified as defendants' special request #4 which was denied.

John L. Draper, Judge.

[fol. 1127]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE

DIVISION TWO

DEFENDANTS' SPECIAL REQUEST NO. 1 AS REVISED BY THE COURT

Gentlemen of the Jury, here is Defendants' special request #1:

Before you can find any of the defendants guilty under this indictment, you must find from the evidence that two or more of the defendants named in the indictment together combined and agreed to do an act violative of the law, and that some overt act was done by the defendants in pursuance of such an illegal agreement. It is not a criminal offense in the State of Tennessee for Negro and white persons to be served food together, nor is it a criminal offense for Negroes to peaceably seek to be served food in a place which offers its services and facilities to the general public.

(Mr. Williams calling something to the Court's attention talks quietly to him.)

The Court: This is, Gentlemen of the Jury, the special request #1, of the defendants, as revised by the Court.

Members of the Jury, I hand you herewith the presentment in this case, the charge of the Court, together with special request #1, as revised by the Court,—it will be your duty when you retire,—to the jury room—to name one of your number as foreman of the jury, retire, consider [fol. 1128] of your verdict in this case, and when you have reached a verdict, report that verdict back to the Court. The jury will retire.

(The jury leaves the courtroom.)

VERDICT

The Court: I understand from a report that the jury is ready to report. I don't know whether they have arrived at a verdict or not. I want this understood. Irrespective of what the verdict may be, if there is one, I don't want any

demonstration in the Courtroom of any kind, either—irrespective of what it should be, and the officers will keep good order and let's be orderly.

Now, are you ready to bring the jury down?

(Answers affirmatively from both counsel.)

The Court: You may bring down the jury.

(The jury comes in.)

Does the state waive the polling of the jury?

Mr. Nichol: We waive the polling of the jury.

The Court: Does the Defendants?

Mr. Looby: The Defendants do not.

The Court: Do not. Call the roll and see if each juror [fol. 1129] is here.

Clerk: Howard C. Lewis.

Mr. Lewis: Here.

Clerk: C. P. Holland.

Mr. Holland: Here.

Clerk: Joe W. Slate.

Mr. Slate: Here.

Clerk: Harley C. Dean.

Mr. Dean: Here.

Clerk: Wm. Rawls.

Mr. Rawls: Here.

Clerk: O. H. Glasgow.

Mr. Glasgow: Here.

Clerk: Herbert Amick.

Mr. Amick: Here.

Clerk: Willie D. Swindle.

Mr. Swindle: Here.

Clerk: Wm. T. Moon.

Mr. Moon: Here.

Clerk: Chas. H. Williams.

Mr. Williams: Here.

Clerk: H. J. Farnsworth.

Mr. Farnsworth: Here.

Clerk: Wendall H. Cooper.

Mr. Cooper: Here.

[fol. 1130] Clerk: They are all here.

The Court: The Jury is all present.

Gentlemen of the jury have you agreed upon a verdict?

Foreman: We have.

The Court: What is it?

Foreman: We agreed, your Honor, on a fine less than $50, so we find the defendants guilty.

The Court: Call the roll and each juror will report his verdict.

Call the roll and poll them.

Clerk: Howard C. Lewis.

Mr. Lewis: Guilty.

Clerk: C. P. Holland.

Mr. Holland: Guilty.

Clerk: Joe W. Slate.

Mr. Slate: Guilty.

Clerk: Harley C. Dean.

Mr. Dean: Guilty.

Clerk: Wm. Rawls.

Mr. Rawls: Guilty.

Clerk: O. H. Glasgow.

Mr. Glasgow: Guilty.

Clerk: Herbert Amick.

Mr. Amick: Guilty.

[fol. 1131] Clerk: Willie D. Swindle.

Mr. Swindle: Guilty.

Clerk: Wm. T. Moon.

Mr. Moon: Guilty.

Clerk: Chas. H. Williams.

Mr. Williams: Guilty.

Clerk: H. J. Farnsworth.

Mr. Farnsworth: Guilty.

Clerk: Wendall H. Cooper.

Mr. Cooper: Guilty.

Mr. Looby: The Defendants want to serve notice for a motion for a new trial.

* * * * * * *

[fol. 1133]

JUDGE'S CERTIFICATE TO BILL OF EXCEPTIONS

On March 19, 1963, the Court pronounced and entered judgment upon the aforesaid verdict of the jury making said verdict the judgment of the Court and sentencing the defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., to pay a fine of $50.00 each, together with the costs of the prosecution and, in addition, each defendant to be confined in the County Workhouse for a period of 90 days.

Said defendants, after giving notice, seasonably filed their motion for new trial, which duly appears of record; and on May 10, 1963, after previous hearing upon said motion for new trial, the Court entered a judgment in all things overruling and disallowing said motion for new trial, to which action of the Court the defendants excepted and prayed, and were granted, an appeal to the Supreme Court of Tennessee, sitting at Nashville.

The defendants, Lester G. McKinnie, John R. Lewis, Frederick Leonard, John Jackson, Jr., Nathal Winter, Frederick Hargraves, Harrison Dean, and Allen Cason, Jr., and each of them, tender this, their Bill of Exceptions, consisting of Books I to VII inclusive, to the judgment of the Court overruling and disallowing their motion for new trial and sentencing accordingly, which is signed and sealed and ordered to be, and is, made a part of the record in this case.

This the 31st day of May, 1963.

John L. Draper, Judge.

Harry G. Nichol, Gale Robinson, Attorneys for the State.
Looby & Williams, By Avon N. Williams, Jr., Attorneys for the Defendants.

[fol. 1134] [File endorsement omitted]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION

Davidson Criminal

Hon. John L. Draper, Judge.

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HABGRAVES,

v.

STATE OF TENNESSEE.

For Plaintiffs in Error: Looby & Williams, Nashville, Tennessee.

For the State: Thomas E. Fox, Assistant Attorney General.

OPINION—Filed January 8, 1964

The plaintiffs in error were convicted of conspiring to injure the business of the B & W Cafeteria by blocking the entrance thereto in the event they were denied entrance to and service in said cafeteria. The jury recommended a fine of less than $50.00. The trial judge sentenced each of these defendants to ninety days in the Davidson County workhouse and fined each of them $50.00. An appeal was seasonably perfected, able briefs filed, and oral arguments were heard, and, after a thorough study of the record and applicable authorities, we now have the matter for disposition.

[fol. 1135] The indictment alleges a violation of two sections of the Tennessee Code, §39-1101 (7), T.C.A., and §62-711, T.C.A. The pertinent part of §39-1101, T.C.A., is as follows:

"The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to com-

mit any act injurious to public health, public morals, trade, or commerce . . ."

Section 62-711, T.C.A., provides, in part, that "any person guilty of turbulent or riotous conduct within or about" any hotel, inn, restaurant, etc., is subject to indictment and a fine of not less than $100.00. Section 62-710, T.C.A., was also mentioned in the indictment and the trial court's charge, but the defendants were not charged with violating this Section of the Code; nor could they have been so charged since this Section does not purport to define an indictable offense. It was mentioned merely to indicate that the B & W Cafeteria was permitted, by statute, to refuse admittance to any person whom it did not desire to serve.

There are thirteen assignments of error. They will not be taken up seriatim, but all of them will be treated and answered in the course of this opinion.

At about 12:20, P.M., Sunday, October 21, 1962, just after many church services had ended, and at a time when [fol. 1136] the patrons of the B & W Cafeteria were arriving for lunch, the defendants appeared at the entrance of the cafeteria which is located on Sixth Avenue, in the heart of Nashville, Tennessee. When they arrived, they were informed by the doorman that the cafeteria did not serve colored people and that they could not enter. Despite this, the defendants remained at the entrance to the cafeteria and insisted that, "We are coming in and are going to eat when we git in."

The defendants were asked in a polite way to move along and to refrain from making any trouble. At this time, they had entered a vestibule to the cafeteria, the size of which is estimated as being from four feet by four feet to six feet by six feet and four inches. The defendants were in the vestibule, but were not permitted to enter the main part of the restaurant. After the defendants refused to remove themselves from the vestibule and after the acts hereinafter set forth had been committed, the police were called and they escorted the defendants away.

In considering the evidence hereinafter briefly summarized, we must remember that, in this State, fact determina-

tions and reasonable inferences to be drawn therefrom are for the trier of facts, in this case the jury. On a review of a judgment of conviction, if there is material evidence to [fol. 1137] support the judgment, the defendants are presumed to be guilty and this Court will not reconsider the question of whether or not the evidence shows that they are guilty beyond a reasonable doubt; but will consider only the question of whether the evidence preponderates against their guilt and in favor of their innocence. *Smith and Reynolds* v. *State,* 205 Tenn., 502, 327 S.W. 2d, 308 (1959), certiorari denied by the Supreme Court of the United States, 361 U.S., 930, 80 S. Ct., 372, 4 L. Ed. 2d, 354 (1960).

The record clearly shows that these defendants physically blocked the entrance to the B & W Cafeteria by placing themselves in this small vestibule so as to prevent people from entering or leaving; and that entrance to and exit from the restaurant was not possible without squeezing and worming through the wall of flesh created by the defendants' presence and position. The evidence likewise shows that in blocking this entrance, the defendants were pushing and shoving to some extent in an effort to enter this restaurant, but were prevented from doing so because the doorman kept the inner door closed to them. For example, one of the State's witnesses testified about the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. . . ."

[fol. 1138] A number of other witnesses testified to this state of facts and as to things they heard while they were trying to get in or out of the restaurant. Probably under the record, one or two white people did squeeze their way either in or out while all of this was going on, but nevertheless these defendants refused to vacate the vestibule until they were peacefully escorted away by the police. The record clearly shows that after the vestibule was cleared,

the people inside the restaurant were able to go out and the people outside the restaurant were able to enter. There is also proof that there were as many as seventy-five people on the outside attempting or wanting to get in while these defendants were in the vestibule.

Section 39-1101, T.C.A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead to a breach of the peace. The charge here, as it is clearly set forth in the indictment, is that the defendants crowded into this small vestibule and through their actions, as detailed above, committed an act injurious to trade and commerce. When two or more persons conspire to commit an act such as this, §39-1101, T.C.A., provides that they shall be guilty of a conspiracy. Section 62-711, T.C.A., in part provides that [fol. 1139] when a person is guilty of turbulent or riotous conduct within or about restaurants, hotels, etc., he may be indicted and fined not less than $100.00. One of the questions raised by the defendants is whether the indictment in this case sufficiently describes the offense to meet the requirements of §40-1802, T.C.A., which provides that the indictment must state the facts in ordinary and concise language so as to enable a person of common understanding to know what was intended, etc. Clearly, the indictment in this case, which consists of over a legal page in 10 point type, informs each of the defendants of the conduct for which he has been indicted, and the statutes which the State contends that such conduct has violated.

The defendants through various motions and throughout the trial attempted to say that this prosecution was brought for the purpose of enforcing a rule of segregation or racial exclusion in facilities licensed by the State, open to the public, and vested with public interest; and that such a prosecution is contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. From a very careful examination and reading of the record, the indictment, and the charge of the court, we certainly feel that such questions are not determinative of this prosecution. We can assume for the sake

of argument that discrimination based on race by a facility [fol. 1140] such as this cafeteria does violate the due process and equal protection clauses, but these questions are not presented here. A careful reading of this record shows that the only question is whether or not these defendants were attempting, in an illegal manner, to correct what they deemed to be an unconstitutional practice on the part of this cafeteria; and, if the method which these defendants adopted was illegal, whether it constitutes a misdemeanor under the Sections of the Code under which they were indicted.

This Court long ago in *State* v. *Lasater,* 68 Tenn., 584 (1877), held that an indictment under §62-711, T.C.A., was good and that the act was constitutional. In that case, a judgment quashing the indictment was reversed where the indictment alleged that the defendant had been guilty of turbulent and riotous conduct within and about a hotel by quarreling, committing assaults and batteries, breaches of the peace, loud noises, and trespass upon a hotel. It seems to us that there is sufficient proof in the instant case, which the jury apparently believed, to warrant the conviction under this Section. The word "riotous" is defined by Webster's New World Dictionary as "having the nature of a riot or disturbance of the peace." The conduct of the defendants certainly meets this definition. Nowhere in this record is it insisted that there was not a prior agreement to engage in such conduct if entrance to this restaurant was denied. In *Smith and Reynolds* v. *State,* supra, this [fol. 1141] Court had occasion to define a criminal conspiracy. This definition seems to meet the situation here. We likewise held in the Smith and Reynolds case that a conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two or more persons to do something unlawful, either as a means or as an ultimate end. While the request for admittance by the defendants was not crimi-

nal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises of the restaurant, the method they employed to effect their admittance was clearly unlawful.

It is very earnestly and ably argued by counsel for the defendants that to prevent the defendants from acting as alleged in the indictment would constitute a denial of freedom of speech in contravention of the 1st Amendment to the Federal Constitution as made applicable to the States through the 14th Amendment. Of course, in this country, a person has a right to speak freely and a denial of this right offends our heritage of freedom. The individual must [fol. 1142] feel free to spea' his mind; the press must be free to publish its opinion; and the movies must be free to express their views. There are literally hundreds of different agencies to whom freedom of expression is guaranteed. But around such freedoms there must be certain safeguards for the protection of society and when these safeguards are violated, the violator is subject to civil or criminal sanctions or both. Thus one cannot be allowed to recklessly shout "fire" in a crowded theatre. In crowding into this narrow vestibule and effectively blocking the entrance to this restaurant, the defendants interfered with the right of other individuals to come and go in the furtherance of trade and commerce and in so doing they violated the Sections of the Code hereinbefore set forth. See *Feiner v. New York*, 340 U.S., 315, 71 S. Ct., 303, 95 L. Ed., 295 (1951).

Had this been a labor dispute, the actions of the defendants would clearly be beyond that of peaceful picketing, which does not include in its definition any form of physical obstruction or interference with business. It is well established that labor has the right to peacefully picket and thereby express its views on the subjects involved in a labor dispute. But the picketing must be peaceful. When it goes beyond the peaceful stage and involves force, violence, threats, terror, intimidation, coercion and other things of like kind, it cannot be tolerated and those persons [fol. 1143] guilty of such acts are subject to state and federal laws. By analogy, if the conduct of the defendants here transcended the bounds of peaceful picketing, they would,

under the evidence in this record, be guilty of acts injurious to trade. We think that their conduct clearly goes beyond the bounds of peaceful demonstration and picketing.

It is very forcefully insisted that the two Sections of the Code under which this indictment was laid should have been declared unconstitutional because they do not clearly and sufficiently define the offense charged against the defendants. In all the years that these Code Sections have been the law in this State, this question has not been raised as far as we can determine. As far as we know, there is no criminal statute which describes every specific kind of violation that might be indictable under it; but so long as the statute generally states, as these statutes do, what is prohibited, their constitutionality cannot be challenged for indefiniteness. We think that the statutes now under consideration clearly set forth the offense intended and that the indictment framed thereunder clearly sets forth the way in which these defendants allegedly violated their provisions.

In his charge to the jury, the trial judge (page 1109 of the transcript) told the jury that the presentment charged [fol. 1144] the defendants with the offense of an unlawful conspiracy to commit acts injurious to the B & W's business in violation of Code Sections 39-1101 (7), T.C.A., and 62-711, T.C.A. Following this, he read these various sections of the code to the jury, including §62-710, T.C.A., and then on the following page of his charge, he set forth the provisions of §62-710 once again. It is argued in behalf of these defendants that the charging and reading of §62-710, T.C.A., which does not purport to define a criminal offense, but is instead a civil statute, was error. A careful reading of the indictment and the whole charge shows that the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section. There were no questions raised following the charge about the propriety of reading it and we do not see how reference to a civil statute such as this, although error, could affect the jury's verdict, since there was ample evidence to convict the defendants of the offense defined in the other sections of the code charged.

It would not have been an unlawful conspiracy for the defendants to agree to seek entry into this cafeteria for the purpose of being served food coupled with an overt act in furtherance of this agreement; but any agreement to obstruct the entrance of a place of business and thus injure their business does constitute an unlawful conspiracy.

[fol. 1145] Among other requested special instructions was one to the effect that the State had abandoned the portion of the indictment charging a conspiracy to violate §62-711, T.C.A. We think that this special instruction was properly refused by the trial court because the whole case is built upon the theory that the defendants' actions in obstructing this passageway was the overt act committed in furtherance of this conspiracy.

Another requested instruction was to the effect that the cafeteria had no legal right to refuse to serve a person because of his race or color. As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway. As citizens, we are not permitted to take the law in our own hands and correct what we consider to be wrongs, except in the abatement of a private nuisance and then we can act only when we can do so without committing a breach of the peace. When we thus commit a breach of the peace by attempting to assert our rights, we are liable under the law for this breach of peace. "Two wrongs do not make a right."

The cross-examination of the witnesses for the State by counsel for the defendants pitches their case on the proposi-

[fol. 1146] tion that if the restaurant people hadn't prevented their entrance they would not have blocked the door. This, of course, is an excellent argument to the jury; but at the same time even assuming that the restaurant people had no right to exclude these people from their premises, this does not permit these defendants to block this passageway.

It is argued and several volumes of this large record are taken up with the proposition that the jury was composed only of white persons whose "personal practice, custom,

philosophy, and belief in complete racial segregation in virtually all aspects of their social existence" thus disqualified them to act as jurors in this case. The jurors on *voir dire* were questioned and cross-examined by counsel for both sides and by the court. See *Smith and Reynolds* v. *State,* supra. Those who were accepted stated that even though they might have the social belief set forth in the above quotation from defendants' counsel, they could exclude this for the purpose of trying these defendants and could decide the case on the basis of the evidence and the law charged to them by the court. As we have said a number of times herein, this is not a case of racial segregation but is rather a prosecution for a conspiracy to obstruct trade. There were a number of Negro jurors examined but all of them were excused for one reason or another and no Negro was on the jury; but there is no constitutional requirement [fol. 1147] that a trial be by a mixed racial jury. If there has been no illegal exclusion of these people from a jury, regardless of their color, then there is no constitutional violation of the rights of the parties. As we said in *Kennedy* v. *State,* 186 Tenn., 310, 210 S.W. 2d, 132 (1947):

> "It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries."

No such discrimination is shown in this case.

Finally it is insisted that the judgment of the court was inconsistent with the verdict of the jury. The jury found each of the defendants guilty and agreed upon a fine of less than $50.00, but did not fix any amount. The trial judge charged the jury that if they did find the defendants guilty under §39-1101, T.C.A., they could impose punishment of imprisonment in the county jail or workhouse for not more than one (1) year and a fine not exceeding $1,000.00 or both, as provided by the statute. He then went on to charge the jury, after reading the statute, that if they convicted these defendants "and believe that a fine of $50.00 or less would be sufficient punishment, then all you need to say in your

verdict is that you find the defendant, or defendants, guilty, and the court will fix the punishment." All the jury was trying to do in its verdict was to state that they found the [fol. 1148] defendants guilty and fixed a fine at less than $50.00 according to the charge of the court. By Article 6, Section 14 of the Tennessee Constitution, no fine in excess of $50.00 may be fixed except by a jury. Section 40-2525, T.C.A., contains the same provision. Thus all the trial judge was doing was trying to comply with this constitutional and statutory provision. The trial judge had the right and discretion to levy a fine, if the jury found them guilty, up to $50.00 and to attach a workhouse sentence, if, in his discretion, he thought the facts merited such punishment. Clearly, he has not abused this discretion in doing what he did here. If the defendants had wanted the jury to fix the fine and imprisonment, if the jury found them guilty, all they had to do at the beginning of the trial was to make the proper request, as provided by §40-2704, T.C.A., that this be done, and if such had been done then the trial judge would have had no authority to fix this fine and imprisonment as he did. Under the situation here, the fine and imprisonment which he levied were clearly in accordance with his right and duty.

Counsel for the defendants in his able brief argues that *Peterson* v. *City of Greenville*, 83 S. Ct., 1119 (1963) and *Lombard* v. *State of Louisiana*, 83 S. Ct., 1122 (1963) are applicable. These two cases are distinguishable from the [fol. 1149] instant case. The trespass complained of in the Peterson and Lombard cases was the act of sitting on a stool at a lunch counter. This is basically an innocent and unoffensive act. It was only unlawful, in the eyes of the city and state concerned, because of a city ordinance in the Peterson case and an executive directive in the Lombard case, both of which required segregation of the races in public facilities. But absent the governmental mandate and the color of the defendants' skin in those two cases, and the act is basically unoffensive and innocent. This is not so in the instant case. *Stripped of any question of race and discrimination, the act complained of is still unlawful.* In the instant case, if these eight defendants had been white boys, their acts would still have been un-

lawful. We cannot escape from the fact that these eight defendants were blocking the entrance to the doorway of the B & W Cafeteria. Regardless of who they were and why they were blocking the doorway, their conduct is still basically unlawful.

In the instant case, we are presented with the timely question of how far a person can go to secure his constitutional rights. Now it seems clear that a person cannot commit an assault on another to gain these rights. It seems equally clear that one cannot damage the property of another with impunity because the other has committed [fol. 1150] an act of racial discrimination against him. We think that it is also clear that these eight defendants cannot interfere with the B & W's trade by blocking the latter's doorway in order to redress the wrong that they feel the cafeteria has visited upon them. The securing of constitutional rights must be done in a lawful manner.

As a result of what we have said herein, the convictions must be affirmed.

Hamilton S. Burnett, Chief Justice.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1151]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION

Davidson Criminal

Affirmed.

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,

vs.

STATE OF TENNESSEE.

JUDGMENT—January 8, 1964

Came the plaintiffs in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, the plaintiffs in error, for the use of the County of Davidson the sum of $50.00, each, the fine assessed against each of them in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that each of the plaintiffs in error be confined in the County Jail or Workhouse of Davidson County, subject to the lawful rules and regu-

lations thereof, for a term of ninety days; and that after expiration of the aforesaid term of imprisonment, they remain in the custody of the Sheriff of Davidson County until said fines and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Davidson County, for the execution of this judgment.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Workhouse Commissioner of Davidson County to the end that this judgment may be executed. 1/8/64.

[fol. 1151a] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1152]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION, NASHVILLE

Davidson Criminal

Stay Order

[Title omitted]

STAY ORDER—January 8, 1964

On application of plaintiffs in error, it is ordered that the judgment entered herein on January 8, 1964, be stayed for a period of twenty (20) days and until a petition for rehearing, if filed within above time in the Supreme Court of Tennessee, is disposed of and during said time the plaintiffs in error will remain released on the bonds for appeal heretofore filed herein. 1/8/64.

[fol. 1152a] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1153]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION

Davidson Criminal

LESTER G. McKINNIE, et al.,

v.

STATE OF TENNESSEE.

OPINION ON PETITION TO REHEAR

The plaintiffs in error through able counsel have filed herein a courteous and dignified petition to rehear. After very carefully considering this petition and the brief in support thereof, we must conclude that it is nothing more than a reargument of the questions presented at the time this case was originally heard.

One additional authority is cited, *State of Delaware* v. *Brown*, 195 A. 2d, 379. This Delaware case is in no wise in point herein. The same reasons that we assigned as to why *Peterson* v. *City of Greenville* and *Lombard* v. *State of Louisiana* were not in point are applicable to the Brown case. In the Brown case, Brown, a Negro, entered the premises of a restaurant and requested service of food. [fol. 1154] The proprietor denied him service solely because of his race, and, upon his refusal to leave, obtained a warrant for his arrest for violation of the criminal trespass statute of Delaware. That is not the question here.

Basically and essentially the whole argument made originally, and now made, is based upon the philosophy and legal reasoning which summed up may be stated thus: in so long as our motives are right we can pursue any means (even though illegal and unlawful) we may choose to accomplish those movties. The authorities cited by the plaintiffs in error all go to the proposition that the motives of these plaintiffs in error were lawful. There is no authority, nor so far as we know can any be found, whereby

one may resort to unlawful and illegal means to accomplish lawful motives.

After thoroughly considering this petition to rehear and the matter again, we are convinced that the means employed by these plaintiffs in error to accomplish their motives were illegal and unlawful, and it is for this alone that they are convicted. Under the factual situation of this case by their using these illegal and unlawful means they have thus violated fundamental law and are guilty. The verdict against them for reasons set forth in our original opinion must be sustained. The petition to rehear is accordingly overruled.

Hamilton S. Burnett, Chief Justice.

[fol. 1154a] Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1155]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION, NASHVILLE

Davidson Criminal

[Title omitted]

ORDER DENYING PETITION TO REHEAR—March 5, 1964

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 3/5/64.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1156]

IN THE SUPREME COURT OF THE STATE OF TENNESSEE

MIDDLE DIVISION

Davidson Criminal

[Title omitted]

STAY ORDER—March 5, 1964

Upon application of plaintiffs-in-error, Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, and for good cause shown, they are hereby granted a stay of execution of judgment of this Court for a period of ninety days from March 5, 1964, pending the disposition of a petition for certiorari to the Supreme Court of the United States and during said time the plaintiffs-in-error will remain released on the bonds for appeal heretofore filed herein, and it is so ordered.

The Clerk of this Court will issue a certified copy of this order to the Criminal Court of Davidson County and to the Sheriff of Davidson County. 3/5/64.

Sheldon B. White, Justice.

Clerk's Certificate to foregoing paper (omitted in printing).

[fol. 1157] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 1159]

SUPREME COURT OF THE UNITED STATES

No. 148—October Term, 1964

LESTER G. McKINNIE, et al., Petitioners,

vs.

TENNESSEE.

ORDER ALLOWING CERTIORARI—October 12, 1964

The petition herein for a writ of certiorari to the Supreme Court of the State of Tennessee, Middle Division, is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

October Term, 1963

No. [redacted] 148

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR. and FREDERICK HARGRAVES,

Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

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IN THE

Supreme Court of the United States

October Term, 1963

No. .....

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR. and FREDERICK HARGRAVES,

Petitioners,

—v.—

STATE OF TENNESSEE.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Tennessee entered in the above-entitled cases on January 8, 1964.

Citation to Opinion Below

The opinion of the Supreme Court of Tennessee is not yet reported and is set forth in the appendix hereto, *infra* pp. 1-13a with the opinion on Petition to Rehear at pp. 16-17a.

Jurisdiction

The judgment of the Supreme Court of Tennessee was entered on January 8, 1964 (App. p. 15a). Petition for rehearing was denied March 5, 1964 (App. p. 18a).

Jurisdiction of this Court is invoked pursuant to Title 28, U. S. C., Section 1257(3), petitioners having alleged below, and alleging here, deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

Questions Presented

Whether petitioners, Negro college students, were denied rights protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution:

1. By arrest and conviction for unlawful conspiracy after peacefully protesting against racial segregation in a "white" restaurant where they were denied entrance and service solely because they were Negroes and where racial segregation was permitted and encouraged by state statute.

2. By the use of state police officials to arrest and state courts to convict petitioners for unlawful conspiracy for the distinct purpose of enforcing the racially discriminatory practices of a restaurant owner.

3. By conviction on a record devoid of any evidence of the essential elements of unlawful conspiracy.

4. By affirmance of their convictions in the Supreme Court of Tennessee on a ground not litigated in the trial court thereby denying them an appeal which considered the case as it was tried.

5. By the trial judge in twice instructing the jury that petitioners were charged with violating a law under which they had not been indicted and which was not even a criminal statute.

6. By trial by an all white jury whose admitted personal practice, custom, philosophy and belief in racial segregation precluded petitioners' having a fair and impartial

jury of their peers, and by the trial judge's refusal to dismiss jurors challenged by petitioners for good cause.

Statutory and Constitutional Provisions Involved

This case involves Section 1 of the Fourteenth Amendment of the Constitution of the United States and the following sections of the Code of the State of Tennessee:

> 39-1101. *"Conspiracy" defined.*—The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . .
>
> 62-710. *Right of owners to exclude persons from places of public accommodation.*—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person

over his private house, vehicle, or private theater, or places of amusement for his family.

62-711. *Penalty for riotous conduct.*—A right is given to any keeper of any hotel, inn, theater, or public house, common carrier, or restaurant against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars ($100), and the offenders shall be liable to a forfeiture of not more than five hundred dollars ($500), and the owner or persons so offended against may sue in his own name for the same.

Statement

These are eight sit-in convictions arising out of a single trial in Nashville, Tennessee.[1] Petitioners, all Negroes, were arrested between 12:30 and 1:00 P.M. at the Burrus and Webber Cafeteria[2] (B.E. 765) and charged under a grand jury indictment[3] (R. 9-13) alleging that they:

> On the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms in the

---

[1] A single record and transcript of testimony exists for all eight petitioners and a single opinion, affirming the convictions, was written by the Supreme Court of Tennessee (App. pp. 1-13a).
Reference to the Technical Record will be designated (R. —), and to the Bill of Exceptions (B.E. —).

[2] Burrus and Webber Cafeteria will hereafter be referred to as B. & W.

[3] Petitioners were arrested without warrants by Nashville police officers and originally charged with violating City Code Chapter 26, Section 59 (state law regarding sit-ins) (B.E. 885). Later, on the same day, warrants were issued charging them with unlawful conspiracy. The grand jury presentment was made on December 12, 1962 (R. 8).

> County aforesaid, unlawfully, willfully, knowingly, deliberately and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation located at 226 Sixth Avenue, North, Nashville, Davidson County, Tennesee (R. 9).

After trial and conviction in the County Court of Davidson County, Tennessee, petitioners were sentenced to ninety (90) days in jail and fifty dollars ($50.00) fine[4] (R. 39, 40). Appeals were taken to the Supreme Court of Tennessee which affirmed the convictions (R. 54). It is from this affirmance that this petition for writ of certiorari is brought.

Around noon on October 21, 1962, eight young Negro men, all college students, quietly entered the front door[5] of the B. & W. Cafeteria (B.E. 766). Two swinging doors on the sidewalk opened on the vestibule (B.E. 767), six feet by four feet in size (B.E. 1070).[6] Another set of swinging doors led into the dining room (B.E. 767).

As petitioners approached the second doors, they were met by Otis Williams, the doorman (B.E. 1071), and told, "We don't serve colored people in here. I want to be nice to you but we don't serve 'em . . . and you can't come in"

---

[4] The jury recommended a fine of less than fifty dollars ($50.00) (R. 38), but the trial judge later imposed the severer sentence.

[5] The cafeteria had a front entrance and a back entrance (B.E. 825).

[6] Estimates on the size of the vestibule varied from four feet by four feet (B.E. 767) to twelve feet by twelve feet (B.E. 903), though Otis Williams, the doorman at B. & W. testified that he measured it as six feet by four feet (B.E. 1070).

(B.E. 1071).[7] Petitioners remained standing in the vestibule for approximately "20 or 25 minutes" when they were arrested (B.E. 772). They committed no act other than attempting to walk through the swinging doors into the cafeteria (B.E. 771, 1098). People were walking in front of the cafeteria, and estimates of the number of people who stood by or near the outside door of the vestibule varied from three or four to seventy-five or one hundred (B.E. 780, 787, 808, 828, 918-919, 956). It was not established how many, if any, of those standing outside desired to enter the B. & W. or were just curious observers. No witness testified that they were prevented either from entering or leaving the cafeteria (B.E. 782-792, 809-810, 841, 892-895, 919-923, 933, 948-949, 960, 1000, 1005, 1025, 1032-1033, 1039), nor was there evidence of any turbulent, riotous or disorderly conduct, by petitioners or others, either inside or outside the cafeteria.

W. W. Carrier, Manager of B. & W., informed of petitioners' presence, entered the vestibule (B.E. 766) and testified that he "discovered a large gathering of people[8] . . . on the outside and eight young Negroes were in the vestibule in between the two doors" (B.E. 766). Carrier did not speak to petitioners (B.E. 771). He called the police and went outside to wait for them (B.E. 771). He testified:

---

[7] Williams, a 64 year old man weighing only 140 pounds, held the door and kept petitioners out while allowing white patrons in the vestibule to enter the cafeteria, one at a time, through a "crack in the door" (B.E. 1070-1071, 1078-1080). He stated he was hired to keep Negro patrons out (B.E. 1088) and was ordered to lock the doors if Negroes came (B.E. 1097). When petitioners arrived, Williams "caught the door going into the cafeteria and stopped them there, and the white people, too . . ." (B.E. 1065).

[8] Carrier did not estimate the number of people.

Q. As you attempted to pass through the vestibule, what, if anything, occurred?

A. Well, actually nothing, sir. The—the young men were standing in position, and it was just a matter of my easing through the crowd (B.E. 772).

Petitioners informed him that they were seeking service (B.E. 775), but Carrier refused because they were Negroes[9] (B.E. 776). At no time did he order petitioners to leave.[10] His sole comment was to request that they move back and let a lady get out (B.E. 773) which petitioners did (B.E. 773). He admitted that persons were able to get in and out of the cafeteria.[11]

Several patrons of B. & W. testified that the doorman was holding the door so the petitioners could not enter, thus causing the congestion (B.E. 785, 893).[12] All entered

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[9] On cross-examination Carrier stated:

"Q. You have the facilities to serve them?
A. We do have.
Q. Was your place of business crowded at the time?
A. It was beginning to be crowded, sir.
Q. Now, the only reason that you didn't serve them was that they were Negroes and not white, wasn't it?
A. Yes, sir.
Q. And the same boys, seeking service would have been all right if they were white?
A. Yes, sir" (B.E. 776-777).

[10] Carrier testified he did not swear out warrants against petitioners and had no idea how his name appeared on them as prosecutor (B.E. 823).

[11] "Q. What occurred to those persons in their attempt to gain access to the cafeteria and leave?
A. Well, it was a little crowded . . ." (B.E. 770).

[12] Charles Edwards stated:

"Q. If the doorman hadn't blocked the door, they would have gone in the place, so that ingress and egress would have been free? Wouldn't it?
A. I suppose so, if he had wanted Negroes in, too.
Q. Yes, sir, the doorman was blocking them so that they couldn't get in?

the cafeteria though a few spoke of having to "elbow" or "push" their way through (B.E. 814, 933). Most entered without any difficulty at all.[13]

Two witnesses testified that petitioners were "pushing and shoving" in the vestibule (B.E. 900-901, 977). However, they admitted that petitioners used no bad language and committed no disorderly act (B.E. 977). One witness testified that as she approached the restaurant she heard someone say, "When we get there, just keep pushing, don't stop. Just keep on pushing," that she looked around and saw a group of Negroes who passed her on the street and entered the restaurant (R. 971, 987-990). No evidence, however, was offered to prove that petitioners agreed or conspired to block the entrance of B. & W.

A. The doorman was holding the door and the Negroes were blocking the vestibule so they couldn't get in there.
Q. . . . The doorman was the one who was blocking the door and keeping people out? Wasn't he?
A. He was holding the Negroes out and as a result, they had the vestibule blocked and the other people couldn't get by."

[13] Mrs. Charles Edwards testified that she "just went right in" (B.E. 799). Mickey Lee Martin testified:

"Q. You had no trouble getting in?
A. No, sir.
Q. Did you have to ask them to let you in?
A. Sir?
Q. Did you have to ask these colored boys to let you in?
A. Yes, sir.
Q. And did they let you in?
A. Yes, sir, they let me in" (B.E. 882).

Patrolman Pyburn went to the B. & W. and testified that petitioners were standing four on either side of the vestibule and that "a person medium sized could get in" (B.E. 1030-1031).

How the Federal Questions Were Raised and Decided Below

After motions to remand the cases from the County Court of Davidson County, Tennessee to the Court of General Sessions were denied on January 4, 1963 (R. 22), petitioners, on January 10, 1963, filed a motion to quash the grand jury presentment and to dismiss alleging that (1) the State of Tennessee, through its judicial officers, was enforcing a policy of racial discrimination contrary to the Fourteenth Amendment to the United States Constitution; (2) the State was forbidden by the Fourteenth Amendment from prosecuting defendants under T. C. A. §62-711; (3) the acts charged constituted no crime; (4) the presentment neither alleged nor showed defendants conspired to do an unlawful act or an unlawful act by unlawful means; and (5) the rights exercised by petitioners were protected by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. January 15, 1963, motion to quash and to dismiss overruled (R. 27).

January 30, 1963, defendants filed motion to quash the presentment or, in the alternative, to require the State to make an election as to which of the state statutes alleged in the indictment to prosecute the defendants under (R. 28). February 1, 1963, motion overruled and defendants excepted (R. 29). Upon arraignment on March 5, 1963, defendants entered pleas of not guilty (R. 30). Defendants were convicted in the County Court of Davidson County, Tennessee on March 9, 1963 (R. 38). The jury recommended a fine of less than fifty dollars ($50.00). March 19, 1963, the court entered judgment and sentenced defendants to fifty dollar ($50.00) fines and ninety (90) days in the County Workhouse (R. 39, 40).

April 18, 1963, petitioners filed motions for new trial on the grounds that: (1) the court erred in overruling defendants' motions to remand the cases to the Court of General Sessions; (2) the court erred in overruling defendants' motion to quash the presentment and to dismiss the action; (3) the court erred in overruling defendants' motion to quash the presentment or, in the alternative, to require the State to make an election as to which of the state statutes alleged in the indictment to prosecute the defendants under; (4) the statutes under which defendants were arrested, tried and convicted were unconstitutional because they failed to warn defendants of the conduct proscribed and contained no standards upon which a judicial determination of guilt could be made, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution; (5) T. C. A. §62-710, one of the statutes under which defendants were charged, is not a criminal statute and conviction thereunder denied due process secured by the Fourteenth Amendment; (6) T. C. A. §§39-1101-(7), 62-710 and 62-711 were unconstitutionally applied to petitioners' conduct because used to enforce racial segregation in facilities licensed by the State, open to the public, and invested with a public interest, contrary to the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; (7) the arrest, trial and conviction of defendants were for the sole purpose of enforcing the discriminatory practices of a restaurant owner contrary to the due process and equal protection clauses of the Fourteenth Amendment; (8) there was no evidence that defendants committed any act either a breach of the peace, injurious to the trade or commerce or turbulent and riotous; (9) prosecution of defendants denied them the right of free assembly and protest guaranteed by the First and Fourteenth Amendments to the United States Constitution; (10) defendants were tried and convicted by a jury from

which all Negro veniremen were deliberately and systematically challenged by the State, depriving them of a fair and impartial jury in violation of Article 1, Section 9 of the Constitution of the State of Tennessee and the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; (11) the court erred in holding certain white jurors competent who admitted a prejudiced attitude toward defendants contrary to Article 1, Section 9 of the Constitution of Tennessee and the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution; (12) there was no evidence of guilt of the offense charged in the presentment; (13) the evidence preponderated in favor of defendants' innocence; (14) the court's judgment and sentence were contrary to the jury verdict and deprived defendants of rights secured by the due process clause of the Fourteenth Amendment; (15) the court erred in denying certain instructions to the jury requested by defendants contrary to the equal protection and due process clauses of the Fourteenth Amendment to the United State Constitution (R. 41-50).

Motion for new trial was overruled May 10, 1963 (R. 53). Defendants excepted and "prayed an appeal in the nature of a writ of error" to the Supreme Court of Tennessee (R. 54). Bill of Exceptions to the County Court order overruling motion for new trial filed May 31, 1963 (R. 63).

On appeal to the Supreme Court of Tennessee the convictions were affirmed. The Court held that:

> These defendants physically blocked the entrance to the B&W Cafeteria by placing themselves in the small vestibule so as to prevent people from entering or leaving; and that entrance to and exit from the restaurant was not possible without squeezing and worming through the wall of flesh created by the defendants'

> presence and position. The evidence likewise shows that in blocking this entrance the defendants were pushing and shoving to some extent in an effort to enter this restaurant, but were prevented from doing so because the doorman kept the inner door closed to them.

It further held that:

> While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises of the restaurant, the method they employed to effect their admittance was clearly unlawful.

The Court stated that the dispositive question on appeal was whether or not the evidence showed that defendants used unlawful means; blocked the doorway of B. & W.; concluded that they did.

Petition for rehearing filed and denied March 5, 1964 (App. 16, 17a).

Reasons for Granting the Writ

The decision below conflicts with applicable decisions of this Court on important constitutional issues.

I.

Petitioners' Convictions Offend the Fourteenth Amendment to the United States Constitution in That They Constitute State Enforcement of Racial Discrimination.

A. *The State of Tennessee Has by Statute Permitted and Encouraged Racial Segregation in Restaurants.*

The undisputed and sole basis for petitioners' arrest and conviction was racial discrimination. At the time of arrest, petitioners were seeking service at B. & W., a white restaurant in the City of Nashville, Tennessee. When refused entrance to the B. & W., they quietly remained in the vestibule until arrested. They were jailed and originally charged with violation of the "state law regarding sit-ins" (B.E. 765). Later, the Davidson County grand jury returned a presentment charging petitioners with unlawful conspiracy to injure trade or commerce by attempting to compel white restaurateurs, including the owners of B. & W., to serve Negroes contrary to their policy of racial segregation.[14]

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[14] The presentment alleged, *inter alia*, that:

. . . Under the provisions of §62-710 of the Code of Tenn., the owner of said cafeteria reserved the right not to admit and to exclude from said cafeteria any person the owner, for any reason whatsoever, chose not to admit or serve in said cafeteria.

Among the rules established by the owner of said B. & W. was one that they would serve food only to persons of Caucasian descent, or white persons, and not to serve food to persons of African descent, or colored persons, and said B. & W. Cafeteria was known to the general public as a cafeteria and dining place, privately owned, serving food only to white persons.

The manager and the doorman[15] of B. & W. stated petitioners were refused service solely because they were Negroes (B.E. 776-777). In his charge the trial judge expressly instructed the jury to convict if it found petitioners conspired to violate, *inter alia*, T. C. A. §62-710, providing that a restaurateur may exclude persons for "any reason whatsoever," including race. *Lasater* v. *State*, 68 Tenn. 584 (1877).[16]

It is patently clear from these facts that the purpose of petitioners' arrest and conviction was to enforce racial discrimination which was permitted and, indeed, encouraged by T. C. A. §62-710. It is equally clear that such state sanction of racial discrimination conflicts with the Fourteenth Amendment. *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (Stewart, *J.*, concurring). (When a state law sanctions racial discrimination in restaurants, the 14th Amendment is invoked.)

In *Peterson* v. *City of Greenville*, 373 U. S. 244, this Court reversed trespass convictions where state law required a restaurant owner to discriminate and stated:

---

[15] Indeed, the doorman was expressly hired for the purpose of keeping Negroes out (B.E. 1088).

[16] In 1875, the State of Tennessee repealed its Common Law innkeeper rule requiring innkeepers to serve all on an equal basis and passed T. C. A. §62-710 permitting them to discriminate. And see *Turner* v. *Memphis*, 369 U. S. 350 (1962). There a restaurant owner set up as a defense to an action brought to enjoin racial segregation in the Dobbs House Restaurant in the City of Memphis T. C. A. §§53-2120, 53-2121, which authorized the Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations . . . as may be necessary pertaining to the safety or sanitation of hotels and restaurants . . ." The Inspection Division passed a regulation providing that "restaurants catering to both white and Negro patrons" should be arranged so that each race is properly segregated (Regulation No. R-18(L)). Dobbs House later amended its answer to include a defense based on T. C. A. §62-710 as justification for its discrimination.

> When the State has commanded a particular result, it has saved to itself the power to determine that result and thereby "to a significant extent" has "become involved" in it, and, in fact, has removed that decision from the sphere of private choice (373 U. S. at 248).

When the state passes a law, as here, permitting and encouraging persons to discriminate against other persons because of race, and the state's judicial processes are employed to enforce that same discrimination, such a "palpable violation of the Fourteenth Amendment cannot be saved by attempting to separate the mental urges of the discriminator" (*Peterson, supra* at 248).

In *Lombard* v. *Louisiana*, 373 U. S. 267, there was no segregation provision but certain city officials had made pronouncements regarding segregation in restaurant facilities. This Court found this constituted state compulsion of racial discrimination and reversed trespass convictions.

The state's involvement here is much stronger than, or at most equal to, that in *Lombard*. Indeed, existence of a state statute permitting and encouraging restaurateurs to discriminate brings this case within the prohibition of *Peterson*.

B. *The State of Tennessee by Arrest and Criminal Conviction of Petitioners Deprived Them of Equal Protection of the Laws.*

The issues presented by this petition are almost identical to those presented in the "Sit-in" cases now pending before this Court in *Barr* v. *City of Columbia*, No. 9, October Term, 1963; *Bouie* v. *City of Columbia*, No. 10, October Term, 1963; *Bell* v. *Maryland*, No. 12, October Term, 1963; *Robinson* v. *Florida*, No. 60, October Term, 1963; and *Griffin* v. *Maryland*, No. 6, October Term, 1963. Here, as

in those cases, the question presented is whether a state may enforce, by arrest and criminal conviction, racial discrimination in public accommodations, particularly where, as here, the state has been significantly involved in the acts of discrimination. That petitioners were in a cafeteria vestibule and not at a lunch counter, and charged with unlawful conspiracy rather than trespass, does not materially change the issues involved. As the questions presented are identical with, or similar to, issues now pending before this Court in other cases where certiorari has been granted, review of this petition is manifestly appropriate. Compare *Trustee of Monroe Ave. Church of Christ* v. *Perkins*, 334 U. S. 813, with *Shelley* v. *Kraemer*, 334 U. S. 1.

There is no question but that the State of Tennessee, by arrest and criminal conviction, has "place[d] its authority behind discriminatory treatment based on race." *Burton* v. *Wilmington Parking Authority*, 365 U. S. 715 (Frankfurter, *J.*, dissenting). No question exists but that this constitutes state action forbidden by the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1; *Buchanan* v. *Warley*, 245 U. S. 60. State action is further involved here because the State of Tennessee has fostered and buttressed racial segregation by state law,[17] custom and tradition and has thereby significantly contributed to and supported the racial discrimination practiced by B. & W.

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[17] In Tennessee, Negroes and whites have been prohibited from studying together (Art. 11, Const. of Tenn., §12; T. C. A. §§49-3701 (held unconstitutional in *Roy* v. *Brittain*, 201 Tenn. 140, 297 S. W. 2d 72), 3702, 3703, 3704 (invalidated in *Kelley* v. *Board of Education*, 270 F. 2d 209 (6th Cir. 1959); going to prison together (T. C. A. §§41-303, 41-1217); marrying one another (T. C. A. §§49-3704, 36-402); riding streetcars together (T. C. A. §§65-1704-1709); or trains (T. C. A. §§65-1314-1315); using the same washhouses in coal mines (T. C. A. §§58-1021, 58-1412). Moreover, Tennessee law expressly permits hotels to provide separate accommodations for Negroes and whites (T. C. A. §62-715).

Moreover, in addition to this, the State of Tennessee has refused to protect petitioners' primary right to equality against the narrow, less significant property claim of restaurant owners and has actively endorsed and supported restaurateurs' "right to discriminate" by statute as well as by use of the state judicial process. Such palpable use of state power to enforce inequality far exceeds the threshold required to invoke the Fourteenth Amendment's limitations. *Shelley* v. *Kraemer*, 334 U. S. 1.[18]

In summary, the evidence leads to the inescapable conclusion that these convictions are no less or more than state enforcement of racial discrimination. The grand jury presentment charging defendants with unlawful conspiracy expressly recognized and relied upon T. C. A. §62-710 as authorizing B. & W.'s racial discrimination as did the trial judge in his instructions to the jury. This, added to the use of police officials to arrest and state courts to criminally punish petitioners solely to enforce a racial exclusion policy sanctioned by the state, in a restaurant licensed by the State and open to the public, is such overwhelming state participation in racial discrimination as to be clearly prohibited by the Fourteenth Amendment to the Constitution of the United States.

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[18] In *State of Delaware* v. *Brown*, 195 A. 2d 379 (1963), the Supreme Court of Delaware reversed trespass convictions against Negroes who refused to leave a restaurant after being requested to leave solely because of race and held that:

> ". . . Judicial action by the State to prosecute and convict defendant for trespass would constitute an encouragement of the actions of the proprietor in excluding defendant upon racially discriminatory grounds. This the State cannot do. As we have previously held, the owner or proprietor of a place of public accommodation, with the exceptions noted, may not be compelled by the State to accept patrons who are personally offensive to him or his customers. It is equally true, therefore, that the State may not compel the Negro patron to leave the place of public accommodation. To do so would place the weight of state power behind the discriminatory action of the owner or proprietor."

II.

These Convictions Deny Due Process of Law Because Based on No Evidence of the Essential Elements of the Crime of Unlawful Conspiracy.

The indictment under which petitioners were charged alleged that they:

> . . . with force and arms, unlawfully, willfully, knowingly, deliberately and intentionally, did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade or commerce of Burrus and Webber . . .

In its opinion the Supreme Court of Tennessee stated:

> Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead to a breach of the peace (App. 4a).

The court further stated that:

> . . . Conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two

or more persons to do something unlawful, either as a means or as an ultimate end.[19]

At the time of arrest, petitioners were merely seeking service at B. & W. in a peaceful manner. Of the numerous witnesses at trial, not one testified to being unable to enter or leave the cafeteria, nor did they see any other person who was prevented from entering or leaving B. & W. while petitioners were present. Most testified that they "had no trouble getting in" (B.E. 888, 892, 1030-1031, 1038). No witness testified that petitioners committed any disorderly act or acts which constituted a breach of the peace. They used no bad language and did not force themselves past the doorman who held the door. Although petitioners were told "we don't serve colored people in here" and "you can't come in" (B.E. 1071), no one asked them to leave the vestibule where they remained until they were arrested.

Two witnesses testified that petitioners were "pushing" and "shoving" (B.E. 917, 977). However, it was not established whether this pushing and shoving resulted from the natural congestion in the vestibule caused by the doorman's blocking the door or by petitioners' actions alone. Moreover, a few white patrons stated that they "pushed" inside the vestibule . . . One man testified that he "kind a pushed" his way in (B.E. 845) and another testified that he "push[ed] my way through with my boy . . . I did a little pushing" (B.E. 933).

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[19] For construction of Tennessee conspiracy statute see: *Delaney* v. *State*, 164 Tenn. 432 (Persons must unite and agree to pursue an unlawful enterprise); *Aymett* v. *State*, 310 S. W. 2d 460; *Cline* v. *State*, 319 S. W. 2d 227 (gist of conspiracy is agreement to effect unlawful end, but, before offense is complete, party to conspiracy must commit some 'overt act'. But cf. *Smith* v. *State*, 205 Tenn. 502 (overt act not required).

Petitioners were not "ugly" or "disrespectful" but were, as one witness testified, "just there" [20] (B.E. 799-800). No witness testified that violence occurred or was even remotely threatened. No rude remarks or gestures were made either by petitioners or by any white persons in or around B. & W.

More importantly, not a mite of proof was offered to establish that petitioners conspired or agreed to obstruct the passageway at B. & W. As already stated, not one witness was prevented from entering or saw anyone else prevented from entering B. & W.,[21] so clearly the passageway was not blocked. And to the extent that it was congested, this stemmed from the doorman's barring the door.

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[20] One woman, however, testified that a defendant "embarrassed" and "humiliated" her (B.E. 976) because he allegedly called her a "hypocrite." On cross-examination she stated that the defendant had said of all the people in the restaurant:

> "Look at them sitting in there, supposed to be christians, just come from church, but they are just a bunch of hypocrites" (B.E. 917).

[21] Indeed, Patrolman Pyburn stated that when he arrived at B. & W. four of the petitioners were standing on either side of the door and there was ample room for him to enter (B.E. 1029). Policeman Moran testified:

> "Q. When you arrived at B. & W. restaurant, what did you do?
>
> A. We went over to the restaurant and seen four boys standing on either side of the restaurant and I turned around and went back to the car and called for our superior officer" (B.E. 1024).

Moran further testified on cross-examination:

> "Q. And you went into the vestibule there? And you had plenty of room to go in?
>
> A. Yes, sir, but it was kind of hard to do without hitting one of these boys with the door.
>
> • • • • •
>
> Q. Yes, what I mean is—you were able to get through it?
>
> A. Oh, I could get through it, yes" (B.E. 1038).

There was no direct evidence of an agreement by petitioners to do anything. The only agreement reasonably inferable from their conduct is that they agreed to go to the restaurant and seek service—admittedly lawful conduct.[22] As there was no blocking of the doorway, there is no basis for inferring an agreement to block the door. Indeed there is no indication that petitioners knew or could have known that a doorman had been hired to keep them out and would bar entrance to the door upon their arrival, thus causing the congestion. The evidence utterly fails to support the Supreme Court of Tennessee's conclusion that they employed unlawful means by obstructing the passageway. Nor is argument required to show that the evidence fails to support any finding of conduct either "riotous," "turbulent," or likely to cause a "breach of the peace." Yet the Supreme Court of Tennessee found that there was sufficient proof of conduct "having the nature of a riot or disturbance of the peace so as to warrant conviction" (App. 6a).

Not only, therefore, was there no evidence that petitioners conspired to commit an unlawful act, the record solidly refutes the Supreme Court of Tennessee's conclusion that the means employed were unlawful.

This case is not materially different from the ordinary sit-in cases, where Negroes have been convicted for trespass after remaining at lunch counters when requested to leave by restaurant owners, solely because of race. No constitutional difference exists between sitting quietly on

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[22] The Supreme Court of Tennessee stated:

> While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises, the method they employed to effect their admittance was clearly unlawful.

a lunch stool and standing quietly in a vestibule to protest racial discrimination. This Court has found no problem in reversing sit-in convictions based on no more evidence than the Negroes' "mere presence" at white restaurants. *Garner* v. *Louisiana,* 368 U. S. 157. Here as in *Garner,* the petitioners were not ordered to leave by the restaurateur or his employees.

It has been recognized that a Negro sitting at a lunch counter in a southern state to protect racial segregation is engaged in a type of expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana, supra* (Mr. Justice Harlan, concurring). If, therefore, petitioners' conduct is construed to constitute an unlawful conspiracy, then the statute under which they were charged and convicted is unconstitutionally vague in that it failed to warn petitioners that it was unlawful to quietly remain in a cafeteria vestibule and because, if so construed, it limits petitioners' right of free expression. *Garner* v. *Louisiana, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Winters* v. *New York,* 333 U. S. 507, 509.

Since the State offered no evidence of an agreement or combination to commit any act, or of the commission of any acts other than peaceably seeking equal food service as Negroes in a restaurant licensed and regulated by the State, open to the public and invested with the public interest, which acts the State is constitutionally proscribed by the Fourteenth Amendment from declaring unlawful or prohibiting through the exercise of State power, these convictions rest on no evidence whatever and therefore deny petitioners due process of law. *Taylor* v. *Louisiana,* 370 U. S. 154; *Thompson* v. *Louisville,* 362 U. S. 199.

III.

Petitioners Were Denied Due Process in That Their Convictions Were Affirmed on a Ground Not Litigated in the Trial Court.

The petitioners were tried and convicted under a grand jury presentment which was drawn on the theory that the B. & W. Cafeteria was legally entitled under Tennessee law (§62-710) to exclude petitioners because of their race (R. 10). The trial judge read the presentment and also §62-710 to the jury (B.E. 1104-1107; 1110), and refused a requested instruction that the cafeteria had no legal right to exclude persons because of race (B.E. 1126).

However, the Tennessee Supreme Court purported to decide the case on the assumption "for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due process and equal protection clauses" (App. 5a-6a). The court asserted that the only question, given this assumption, was whether the method that petitioners adopted was illegal (App. 6a). The Supreme Court of Tennessee disposed of the claimed trial error in refusing an instruction that the cafeteria had no legal right to refuse service on the basis of race by saying (App. 10a):

> As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway.

The fallacy of this reasoning is that the case was not submitted to the jury on this basis. The jury received the case on the theory that the petitioners had lawfully been

excluded from the B. & W. Cafeteria because of their race. Thus, the affirmance of the conviction was based on a theory directly contrary to that under which the petitioners were charged and the case went to the jury. As this Court said in *Cole* v. *Arkansas,* 333 U. S. 196, 201:

> [If a state] provides for an appeal to the State Supreme Court and on that appeal considers questions raised under the Federal Constitution, the proceedings in that court are a part of the process of law under which the petitioners' convictions must stand or fall.

Here, as in *Cole,* the State Supreme Court did not affirm the "conviction on the basis of the trial petitioners were afforded." The affirmance was on a theory directly contrary to that under which the jury was instructed.

It is obvious that the jury might have reached a different result if it had been instructed that the B. & W. Cafeteria had no legal right to exclude petitioners because of race and violated their rights when it did so. Further, the jury was never instructed to consider the issue which the State Supreme Court did decide, that is, whether petitioners' method of seeming to vindicate their (assumed) right to enter the cafeteria was unlawful. Thus, the conviction clearly must be reversed under the holding of *Cole* v. *Arkansas, supra,* at 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

It is submitted that the Tennessee Supreme Court's disposition of the petitioners' appeal on grounds not considered at the trial denied them due process.

IV.

Petitioners Were Denied Due Process in Violation of the Fourteenth Amendment When the Trial Judge Instructed the Jury That Petitioners Were Charged With Violation of a Statute When (a) Petitioners Had Not in Fact Been Indicted for Violation of the Statute and (b) It Was Not Even a Criminal Statute.

Petitioners were indicted for violating Section 39-1101(7) and Section 62-711 of the Code of Tennessee. In his instructions, however, the trial judge told the jury that petitioners were charged not only with violation of §39-1101(7) and §62-711, but also that they were charged with a violation of §62-710 (B.E. 1110-1111; 1116). Section 62-710, which is not a criminal law at all, merely abrogates the common law responsibility of innkeepers and other keepers of public places to serve all comers and gives them the right to control the admission or exclusion of persons in such places. It had been mentioned in the indictment, but there was no indication that petitioners were charged with violating it. But, after reading all three laws to the jury the trial judge on two separate occasions told the jury that the defendants were charged with violating §62-710 (B.E. 1110; 1116).[23] Petitioners' motion for new trial

[23] The trial judge told the jury (B.E. 1110-1111):

> . You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101(7), Code Sections 62-710 and 62-711, in that they did unlawfully commit acts injurious to the restaurant business, trade and commerce of Burrus & Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

And also at B.E. 1116-1117 he said:

> . . . If you find and believe beyond a reasonable doubt that the said defendants unlawfully, wilfully, knowingly, deliber-

urging this as a denial of due process was overruled (R. 42-43).

The action of the trial judge in twice instructing the jury that they could convict petitioners upon a charge not made or even capable of being made, clearly violated petitioners' rights to due process of law. In *Stromberg* v. *California*, 283 U. S. 359, a conviction based on a general verdict under a state statute was set aside because one part of a statute submitted to the jury was unconstitutional. In *Terminiello* v. *Chicago*, 337 U. S. 1, the court in instructing the jury about a city ordinance did so with a theory which permitted conviction on an unconstitutional basis.

Here, the statute which petitioners were alleged to have violated is not even a statute under which one may be criminally punished. Moreover, petitioners were never charged with its violation. In *DeJonge* v. *Oregon*, 299 U. S. 353, 362, this court said: "Conviction upon a charge not made would be sheer denial of due process."

The Supreme Court of Tennessee attempted to explain away the manifest error of the trial judge by correctly characterizing Section 62-710 as a civil statute abrogating the common law, but this in no sense can be taken as a

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ately and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Tennessee Code Section 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, as charged in the presentment, then it would be your duty to convict the defendants; provided, that they, or one of them, did, in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement; that is, if you find that said agreements and acts in the furtherance of said objective were done in Davidson County, Tennessee.

cure of the fundamental evil involved here. By interjecting provisions of law which not only confused the jury, and which may have provided a basis for conviction not present in Section 39-1101(7) and Section 62-711, the conduct of the trial judge placed petitioners in jeopardy of conviction upon a charge never made, under a law incapable of sustaining a conviction, and for conduct not even made criminal by state law. The Tennessee Supreme Court acknowledged that this was error, but deemed it harmless (App. 9a). The Court's description of what occurred, focused merely on the fact that the trial judge read §62-710 to the jury. But petitioners' objection was that the judge twice told the jury that they were charged with violating §62-710, when this was not the case. Obviously this incorrect instruction about what was charged may well have affected the verdict and cannot be regarded as harmless. Indeed it is difficult to conceive any more harmful instruction than an incorrect statement of the crime charged.

The State Supreme Court's statement that "there were no questions raised following the charge about the propriety of reading it [§62-710]" misses the mark on several counts. First, the petitioners sought and were refused an instruction contrary to the one given to the effect that notwithstanding §62-710, the restaurant had no right to exclude them (B.E. 1126). Secondly, they did object, by motion for new trial to the reading of this statute (R. 42-43). Thirdly, they also objected, on due process grounds, to the trial judge's misstatement of the offense charged, in the motion for new trial (R. 43). Finally, there is nothing in the opinion below to indicate that this objection came too late. The stated ground of decision below was "harmless error" and not any theory that the objection was not timely. In any event there were no objections made to the instructions given in *Stromberg* and *Terminiello, supra.*

V.

Petitioners Were Denied a Fair and Impartially Constituted Jury Contrary to Due Process of Law and Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

Almost without exception, the white veniremen, including some of the twelve persons who tried and convicted petitioners, upon extensive examination by petitioners' counsel during *voir dire*, admitted a firm and life-long practice, custom, philosophy and belief in racial segregation. Most of the veniremen expressed belief that a restaurant owner had a right to exclude anybody, including Negroes, from his place of business.

Despite this fact, the trial judge in every instance overruled petitioners' challenges for good cause and held certain white jurors competent. For instance, Herbert Amick was held competent by the trial court over petitioners' challenge after testifying:

> Q. But you think that a business open to the public should be allowed to exclude Negroes?
>
> A. If they so desire, yes.
>
> Q. A restaurant business, then specifically,—in particular? And having that opinion where in the indictment in this case charges that the B & W Cafeteria had had such a rule, and that these defendants went there and sought service, knowing that the B & W had such a rule and then you would start out with a prejudiced attitude toward these defendants?
>
> A. Well, I would—
>
> Q. By reason of your belief?
>
> A. I would believe the B & W would be right in this case on their position.

Q. And you would start—what I am saying, though is you would start out in this case with a prejudiced attitude toward the defendants, wouldn't you?

A. In this particular case, I imagine I would (B.E. 452-453).

Similarly, the trial court held competent other jurors, over petitioners' objections for cause, who testified that their entire lives and all their personal associations had been on a segregated basis without any contact with Negroes on a basis of equality (B.E. 665-669, 756, 759).

In the case at bar, where the very issue to be tried was the right of a restaurateur to exclude persons on the basis of race, the trial judge's failure to exclude these jurors with admittedly preconceived notions against Negroes and in favor of B. & W.'s practice of racial segregation, was highly prejudicial and denied petitioners' right to trial by a fair and impartial jury.

This Court has repeatedly recognized that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community." *Smith* v. *Texas,* 311 U. S. 128, 130; *Glasser* v. *United States,* 315 U. S. 60, 85; *Thiel* v. *Southern Pacific Co.,* 328 U. S. 218, 220. This Court has also recognized that racial prejudice is a valid ground for disqualification of a juror, *Aldridge* v. *United States,* 283 U. S. 308. In *Aldridge* it was said:

> . . . [T]he question is not as to the civil privileges of the Negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment . . . one of them was shown to

entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit (283 U. S. at 314).

It is clear that the jurors described above and declared competent by the trial court were incapable, by virtue of their segregationist beliefs, to render petitioners a fair and impartial verdict and that their presence as jurors prejudiced petitioners' right to an unbiased trial. Such action denied due process as well as equal protection of the laws. The test established in *Aldridge, supra,* is more than met here.

CONCLUSION

Wherefore, it is respectfully submitted that the petition for certiorari should be granted.

Respectfully submitted,

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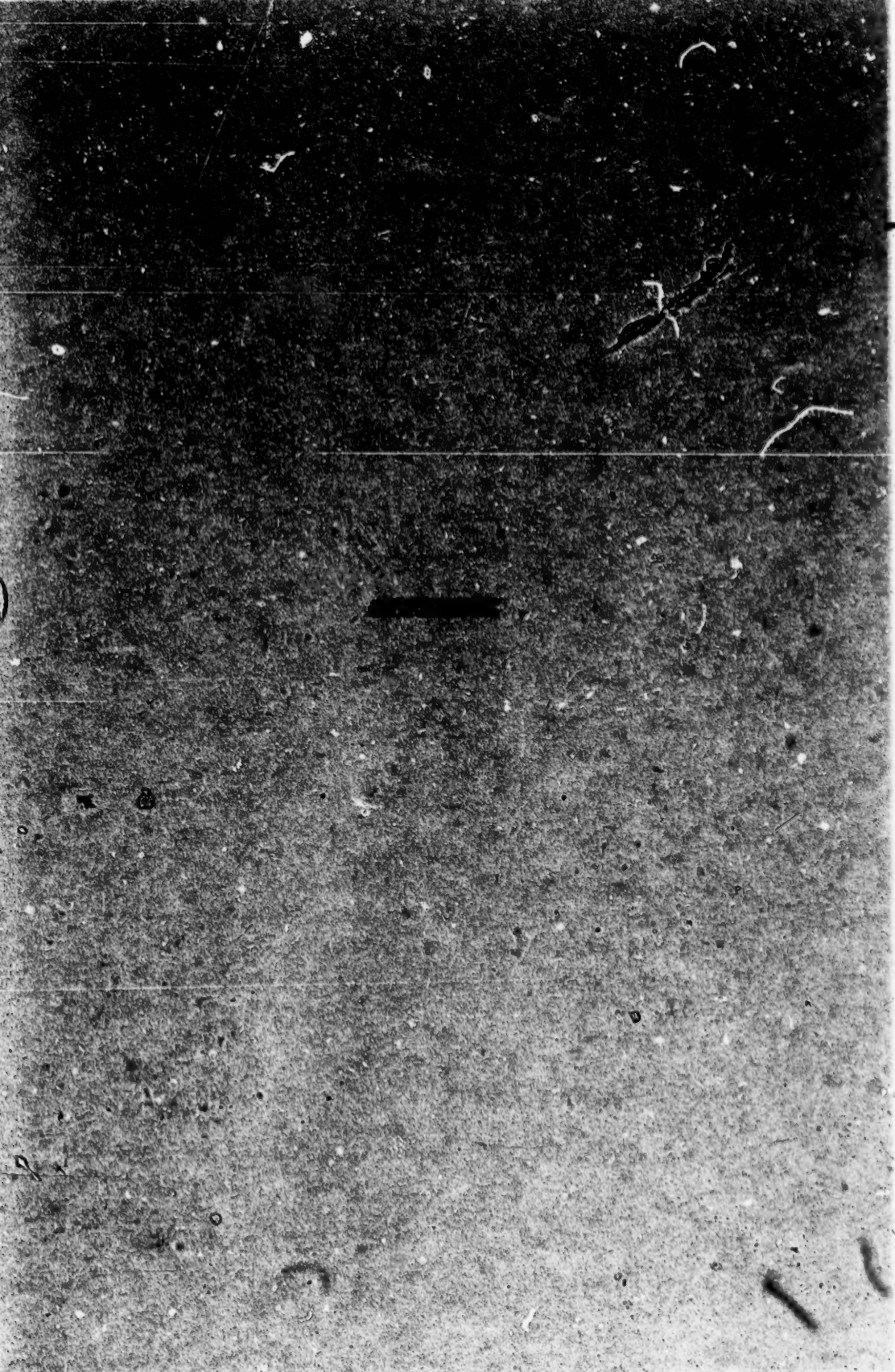

APPENDIX

DAVIDSON CRIMINAL

HON. JOHN L. DRAPER, *Judge*

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,

—v.—

STATE OF TENNESSEE.

For Plaintiffs in Error:

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Nashville, Tennessee

For the State:

Thomas E. Fox
Assistant Attorney General

Opinion

The plaintiffs in error were convicted of conspiring to injure the business of the B & W Cafeteria by blocking the entrance thereto in the event they were denied entrance to and service in said cafeteria. The jury recommended a fine of less than $50.00. The trial judge sentenced each of these defendants to ninety days in the Davidson County workhouse and fined each of them $50.00. An appeal was seasonably perfected, able briefs filed, and oral arguments were heard, and, after a thorough study of the record and applicable authorities, we now have the matter for disposition.

Opinion

The indictment alleges a violation of two sections of the Tennessee Code, §39-1101 (7), T. C. A., and §62-711, T. C. A. The pertinent part of §39-1101, T. C. A., is as follows:

> "The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . ."

Section 62-711, T. C. A., provides, in part, that "any person guilty of turbulent or riotous conduct within or about" any hotel, inn, restaurant, etc., is subject to indictment and a fine of not less than $100.00. Section 62-710, T. C. A., was also mentioned in the indictment and the trial court's charge, but the defendants were not charged with violating this Section of the Code; nor could they have been so charged since this Section does not purport to define an indictable offense. It was mentioned merely to indicate that the B & W Cafeteria was permitted, by statute, to refuse admittance to any person whom it did not desire to serve.

There are thirteen assignments of error. They will not be taken up seriatim, but all of them will be treated and answered in the course of this opinion.

At about 12:20, P.M., Sunday, October 21, 1962, just after many church services had ended, and at a time when the patrons of the B & W Cafeteria were arriving for lunch, the defendants appeared at the entrance of the cafeteria which is located on Sixth Avenue, in the heart of Nashville, Tennessee. When they arrived, they were informed by the doorman that the cafeteria did not serve colored people and that they could not enter. Despite this,

the defendants remained at the entrance to the cafeteria and insisted that, "We are coming in and are going to eat when we git in."

The defendants were asked in a polite way to move along and to refrain from making any trouble. At this time, they had entered a vestibule to the cafeteria, the size of which is estimated as being from four feet by four feet to six feet by six feet and four inches. The defendants were in the vestibule, but were not permitted to enter the main part of the restaurant. After the defendants refused to remove themselves from the vestibule and after the acts hereinafter set forth had been committed, the police were called and they escorted the defendants away.

In considering the evidence hereinafter briefly summarized, we must remember that, in this State, fact determinations and reasonable inferences to be drawn therefrom are for the trier of facts, in this case the jury. On a review of a judgment of conviction, if there is material evidence to support the judgment, the defendants are presumed to be guilty and this Court will not reconsider the question of whether or not the evidence shows that they are guilty beyond a reasonable doubt; but will consider only the question of whether the evidence preponderates against their guilt and in favor of their innocence. *Smith and Reynolds* v. *State*, 205 Tenn., 502, 327 S. W. 2d, 308 (1959), certiorari denied by the Supreme Court of the United States, 361 U. S., 930, 80 S. Ct., 372, 4 L. Ed. 2d, 354 (1960).

The record clearly shows that these defendants physically blocked the entrance to the B & W Cafeteria by placing themselves in this small vestibule so as to prevent people from entering or leaving; and that entrance to and exit from the restaurant was not possible without squeezing

and worming through the wall of flesh created by the defendants' presence and position. The evidence likewise shows that in blocking this entrance, the defendants were pushing and shoving to some extent in an effort to enter this restaurant, but were prevented from doing so because the doorman kept the inner door closed to them. For example, one of the State's witnesses testified about the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. . . ."

A number of other witnesses testified to this state of facts and as to things they heard while they were trying to get in or out of the restaurant. Probably under the record, one or two white people did squeeze their way either in or out while all of this was going on, but nevertheless these defendants refused to vacate the vestibule until they were peacefully escorted away by the police. The record clearly shows that after the vestibule was cleared, the people inside the restaurant were able to go out and the people outside the restaurant were able to enter. There is also proof that there were as many as seventy-five people on the outside attempting or wanting to get in while these defendants were in the vestibule.

Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead

to a breach of the peace. The charge here, as it is clearly set forth in the indictment, is that the defendants crowded into this small vestibule and through their actions, as detailed above, committed an act injurious to trade and commerce. When two or more persons conspire to commit an act such as this, §39-1101, T. C. A., provides that they shall be guilty of a conspiracy. Section 62-711, T. C. A., in part provides that when a person is guilty of turbulent or riotous conduct within or about restaurants, hotels, etc., he may be indicted and fined not less than $100.00. One of the questions raised by the defendants is whether the indictment in this case sufficiently describes the offense to meet the requirements of §40-1802, T. C. A., which provides that the indictment must state the facts in ordinary and concise language so as to enable a person of common understanding to know what was intended, etc. Clearly, the indictment in this case, which consists of over a legal page in 10 point type, informs each of the defendants of the conduct for which he has been indicted, and the statutes which the State contends that such conduct has violated.

The defendants through various motions and throughout the trial attempted to say that this prosecution was brought for the purpose of enforcing a rule of segregation or racial exclusion in facilities licensed by the State, open to the public, and vested with public interest; and that such a prosecution is contrary to the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States. From a very careful examination and reading of the record, the indictment, and the charge of the court, we certainly feel that such questions are not determinative of this prosecution. We can assume for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due

process and equal protection clauses, but these questions are not presented here. A careful reading of this record shows that the only question is whether or not these defendants were attempting, in an illegal manner, to correct what they deemed to be an unconstitutional practice on the part of this cafeteria; and, if the method which these defendants adopted was illegal, whether it constitutes a misdemeanor under the Sections of the Code under which they were indicted.

This Court long ago in *State* v. *Lasater,* 68 Tenn., 584 (1877), held that an indictment under §62-711, T. C. A., was good and that the act was constitutional. In that case, a judgment quashing the indictment was reversed where the indictment alleged that the defendant had been guilty of turbulent and riotous conduct within and about a hotel by quarreling, committing assaults and batteries, breaches of the peace, loud noises, and trespass upon a hotel. It seems to us that there is sufficient proof in the instant case, which the jury apparently believed, to warrant the conviction under this Section. The word "riotous" is defined by Webster's New World Dictionary as "having the nature of a riot or disturbance of the peace." The conduct of the defendants certainly meets this definition. Nowhere in this record is it insisted that there was not a prior agreement to engage in such conduct if entrance to this restaurant was denied. In *Smith and Reynolds* v. *State, supra,* this Court had occasion to define a criminal conspiracy. This definition seems to meet the situation here. We likewise held in the *Smith and Reynolds* case that a conspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more

persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two or more persons to do something unlawful, either as a means or as an ultimate end. While the request for admittance by the defendants was not criminal in the first instance, and while for the sake of argument, we may even assume that they had a right to go on the premises of the restaurant, the method they employed to effect their admittance was clearly unlawful.

It is very earnestly and ably argued by counsel for the defendants that to prevent the defendants from acting as alleged in the indictment would constitute a denial of freedom of speech in contravention of the 1st Amendment to the Federal Constitution as made applicable to the States through the 14th Amendment. Of course, in this country, a person has a right to speak freely and a denial of this right offends our heritage of freedom. The individual must feel free to speak his mind; the press must be free to publish its opinion; and the movies must be free to express their views. There are literally hundreds of different agencies to whom freedom of expression is guaranteed. But around such freedoms there must be certain safeguards for the protection of society and when these safeguards are violated, the violator is subject to civil or criminal sanctions or both. Thus one cannot be allowed to recklessly shout "fire" in a crowded theatre. In crowding into this narrow vestibule and effectively blocking the entrance to this restaurant, the defendants interfered with the right of other individuals to come and go in the furtherance of trade and commerce and in so doing they violated the Sections of the Code hereinbefore set forth. See *Feiner* v. *New York*, 340 U. S., 315, 71 S. Ct., 303, 95 L. Ed., 295 (1951).

Had this been a labor dispute, the actions of the defendants would clearly be beyond that of peaceful picketing, which does not include in its definition any form of physical obstruction or interference with business. It is well established that labor has the right to peacefully picket and thereby express its views on the subjects involved in a labor dispute. But the picketing must be peaceful. When it goes beyond the peaceful stage and involves force, violence, threats, terror, intimidation, coercion and other things of like kind, it cannot be tolerated and those persons guilty of such acts are subject to state and federal laws. By analogy, if the conduct of the defendants here transcended the bounds of peaceful picketing, they would, under the evidence in this record, be guilty of acts injurious to trade. We think that their conduct clearly goes beyond the bounds of peaceful demonstration and picketing.

It is very forcefully insisted that the two Sections of the Code under which this indictment was laid should have been declared unconstitutional because they do not clearly and sufficiently define the offense charged against the defendants. In all the years that these Code Sections have been the law in this State, this question has not been raised as far as we can determine. As far as we know, there is no criminal statute which describes every specific kind of violation that might be indictable under it; but so long as the statute generally states, as these statutes do, what is prohibited, their constitutionality cannot be challenged for indefiniteness. We think that the statutes now under consideration clearly set forth the offense intended and that the indictment framed thereunder clearly sets forth the way in which these defendants allegedly violated their provisions.

In his charge to the jury, the trial judge (page 1109 of the transcript) told the jury that the presentment charged the defendants with the offense of an unlawful conspiracy to commit acts injurious to the B & W's business in violation of Code Sections 39-1101 (7), T. C. A., and 62-711, T. C. A. Following this, he read these various sections of the code to the jury, including §62-710, T. C. A., and then on the following page of his charge, he set forth the provisions of §62-710 once again. It is argued in behalf of these defendants that the charging and reading of §62-710, T. C. A., which does not purport to define a criminal offense, but is instead a civil statute, was error. A careful reading of the indictment and the whole charge shows that the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section. There were no questions raised following the charge about the propriety of reading it and we do not see how reference to a civil statute such as this, although error, could affect the jury's verdict, since there was ample evidence to convict the defendants of the offense defined in the other sections of the code charged.

It would not have been an unlawful conspiracy for the defendants to agree to seek entry into this cafeteria for the purpose of being served food coupled with an overt act in furtherance of this agreement; but any agreement to obstruct the entrance of a place of business and thus injure their business does constitute an unlawful conspiracy.

Among other requested special instructions was one to the effect that the State had abandoned the portion of the indictment charging a conspiracy to violate §62-711, T. C. A. We think that this special instruction was properly refused by the trial court because the whole case is built upon the theory that the defendants' actions in ob-

structing this passageway was the overt act committed in furtherance of this conspiracy.

Another requested instruction was to the effect that the cafeteria had no legal right to refuse to serve a person because of his race or color. As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway. As citizens, we are not permitted to take the law in our own hands and correct what we consider to be wrongs, except in the abatement of a private nuisance and then we can act only when we can do so without committing a breach of the peace. When we thus commit a breach of the peace by attempting to assert our rights, we are liable under the law for this breach of peace. "Two wrongs do not make a right."

The cross-examination of the witnesses for the State by counsel for the defendants pitches their case on the proposition that if the restaurant people hadn't prevented their entrance they would not have blocked the door. This, of course, is an excellent argument to the jury; but at the same time even assuming that the restaurant people had no right to exclude these people from their premises, this does not permit these defendants to block this passageway.

It is argued and several volumes of this large record are taken up with the proposition that the jury was composed only of white persons whose "personal practice, custom, philosophy, and belief in complete racial segregation in virtually all aspects of their social existence" thus disqualified them to act as jurors in this case. The jurors on *voir dire* were questioned and cross-examined by counsel for both sides and by the court. See *Smith*

and Reynolds v. *State, supra.* Those who were accepted stated that even though they might have the social belief set forth in the above quotation from defendants' counsel, they could exclude this for the purpose of trying these defendants and could decide the case on the basis of the evidence and the law charged to them by the court. As we have said a number of times herein, this is not a case of racial segregation but is rather a prosecution for a conspiracy to obstruct trade. There were a number of Negro jurors examined but all of them were excused for one reason or another and no Negro was on the jury; but there is no constitutional requirement that a trial be by a mixed racial jury. If there has been no illegal exclusion of these people from a jury, regardless of their color, then there is no constitutional violation of the rights of the parties. As we said in *Kennedy* v. *State,* 186 Tenn., 310, 210 S. W. 2d, 132 (1947):

> "It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries."

No such discrimination is shown in this case.

Finally it is insisted that the judgment of the court was inconsistent with the verdict of the jury. The jury found each of the defendants guilty and agreed upon a fine of less than $50.00, but did not fix any amount. The trial judge charged the jury that if they did find the defendants guilty under §39-1101, T. C. A., they could impose punishment of imprisonment in the county jail or workhouse for not more than one (1) year and a fine not exceeding $1,000.00 or both, as provided by the statute. He

then went on to charge the jury, after reading the statute, that if they convicted these defendants "and believe that a fine of $50.00 or less would be sufficient punishment, then all you need to say in your verdict is that you find the defendant, or defendants, guilty, and the court will fix the punishment." All the jury was trying to do in its verdict was to state that they found the defendants guilty and fixed a fine at less than $50.00 according to the charge of the court. By Article 6, Section 14 of the Tennessee Constitution, no fine in excess of $50.00 may be fixed except by a jury. Section 40-2525, T. C. A., contains the same provision. Thus all the trial judge was doing was trying to comply with this constitutional and statutory provision. The trial judge had the right and discretion to levy a fine, if the jury found them guilty, up to $50.00 and to attach a workhouse sentence, if, in his discretion, he thought the facts merited such punishment. Clearly, he has not abused this discretion in doing what he did here. If the defendants had wanted the jury to fix the fine and imprisonment, if the jury found them guilty, all they had to do at the beginning of the trial was to make the proper request, as provided by §40-2704, T. C. A., that this be done, and if such had been done then the trial judge would have had no authority to fix this fine and imprisonment as he did. Under the situation here, the fine and imprisonment which he levied were clearly in accordance with his right and duty.

Counsel for the defendants in his able brief argues that *Peterson* v. *City of Greenville,* 83 S. Ct., 1119 (1963) and *Lombard* v. *State of Louisiana,* 83 S. Ct., 1122 (1963) are applicable. These two cases are distinguishable from the instant case. The trespass complained of in the *Peterson* and *Lombard* cases was the act of sitting on a stool at

a lunch counter. This is basically an innocent and unoffensive act. It was only unlawful, in the eyes of the city and state concerned, because of a city ordinance in the *Peterson* case and an executive directive in the *Lombard* case, both of which required segregation of the races in public facilities. But absent the governmental mandate and the color of the defendants' skin in those two cases, and the act is basically unoffensive and innocent. This is not so in the instant case. *Stripped of any question of race and discrimination, the act complained of is still unlawful.* In the instant case, if these eight defendants had been white boys, their acts would still have been unlawful. We cannot escape from the fact that these eight defendants were blocking the entrance to the doorway of the B & W Cafeteria. Regardless of who they were and why they were blocking the doorway, their conduct is still basically unlawful.

In the instant case, we are presented with the timely question of how far a person can go to secure his constitutional rights. Now it seems clear that a person cannot commit an assault on another to gain these rights. It seems equally clear that one cannot damage the property of another with impunity because the other has committed an act of racial discrimination against him. We think that it is also clear that these eight defendants cannot interfere with the B & W's trade by blocking the latter's doorway in order to redress the wrong that they feel the cafeteria has visited upon them. The securing of constitutional rights must be done in a lawful manner.

As a result of what we have said herein, the convictions must be affirmed.

/s/ Hamilton S. Burnett
Hamilton S. Burnett,
Chief Justice.

Judgment

SUPREME COURT
NASHVILLE

Davidson Criminal

LESTER G. MCKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,

—VS.—

STATE OF TENNESSEE.

Affirmed.

Came the plaintiffs in error by counsel, and also came the Attorney General on behalf of the State, and this cause was heard on the transcript of the record from the Criminal Court of Davidson County; and upon consideration thereof, this Court is of opinion that there is no reversible error on the record, and that the judgment of the Court below should be affirmed, and it is accordingly so ordered and adjudged by the Court.

It is therefore ordered and adjudged by the Court that the State of Tennessee recover of Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, the plaintiffs in error, for the use of the County of Davidson the sum of $50.00, each, the fine assessed against each of them in the Court below, together with the costs of the cause accrued in this Court and in the Court below, and execution may issue from this Court for the cost of the appeal.

It is further ordered by the Court that each of the plaintiffs in error be confined in the County Jail or Workhouse of Davidson County, subject to the lawful rules and regu-

lations thereof, for a term of ninety days; and that after expiration of the aforesaid term of imprisonment, they remain in the custody of the Sheriff of Davidson County until said fines and costs are paid, secured or worked out as required by law, and this cause is remanded to the Criminal Court of Davidson County, for the execution of this judgment.

The Clerk of this Court will issue duly certified copies of this judgment to the Sheriff and the Workhouse Commissioner of Davidson County to the end that this judgment may be executed.

1/8/64.

Opinion on Petition to Rehear

DAVIDSON CRIMINAL

LESTER G. MCKINNIE, *et al.*,

—v.—

STATE OF TENNESSEE.

The plaintiffs in error through able counsel have filed herein a courteous and dignified petition to rehear. After very carefully considering this petition and the brief in support thereof, we must conclude that it is nothing more than a reargument of the questions presented at the time this case was originally heard.

One additional authority is cited, *State of Delaware* v. *Brown*, 195 A. 2d, 379. This Delaware case is in no wise in point herein. The same reasons that we assigned as to why *Peterson* v. *City of Greenville* and *Lombard* v. *State of Louisiana* were not in point are applicable to the *Brown* case. In the *Brown* case, Brown, a Negro, entered the premises of a restaurant and requested service of food. The proprietor denied him service solely because of his race, and, upon his refusal to leave, obtained a warrant for his arrest for violation of the criminal trespass statute of Delaware. That is not the question here.

Basically and essentially the whole argument made originally, and now made, is based upon the philosophy and legal reasoning which summed up may be stated thus: in so long as our motives are right we can pursue any means (even though illegal and unlawful) we may choose to accomplish those motives. The authorities cited by the plaintiffs in error all go to the proposition that the motives of

these plaintiffs in error were lawful. There is no authority, nor so far as we know can any be found, whereby one may resort to unlawful and illegal means to accomplish lawful motives.

After thoroughly considering this petition to rehear and the matter again, we are convinced that the means employed by these plaintiffs in error to accomplish their motives were illegal and unlawful, and it is for this alone that they are convicted. Under the factual situation of this case by their using these illegal and unlawful means they have thus violated fundamental law and are guilty. The verdict against them for reasons set forth in our original opinion must be sustained. The petition to rehear is accordingly overruled.

/s/ HAMILTON S. BURNETT
Hamilton S. Burnett,
Chief Justice.

Petition to Rehear Denied

SUPREME COURT

NASHVILLE

DAVIDSON CRIMINAL

LESTER G. MCKINNIE, *et al.*,

—VS.—

STATE OF TENNESSEE.

PETITION TO REHEAR DENIED

This cause coming on further to be heard on a petition to rehear and reply thereto, upon consideration of all of which and the Court finding no merit in the petition, it is denied at the cost of the petitioner. 3/5/64.

No. 148

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IN THE

SUPREME COURT OF THE UNITED STATES.

1964

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. McCANLESS,
Attorney General,
State of Tennessee.

THOMAS E. FOX,
Assistant Attorney General,
State of Tennessee.

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IN THE

SUPREME COURT OF THE UNITED STATES.

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioners, Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, were convicted by a jury in Davidson County, Tennessee, for a conspiracy to injure the business of the B & W Cafeteria by blocking the entrance to the restaurant in violation of Section 39-1101, Tennessee Code Annotated,

and Section 62-711, Tennessee Code Annotated. Punishment for each petitioner was fixed in a manner according to the law of Tennessee at ninety days in the Workhouse of Davidson County and a fine of $50.00.

To show the motive of the petitioners, it was set out in the indictment that the management of the B & W Cafeteria of Nashville, Tennessee, was operating a restaurant open only to people of the white race pursuant to Section 62-710, Tennessee Code Annotated, which abrogates the common law to the extent that keepers of hotels, public houses, etc., may exclude any person whom they shall for any reason choose.

OPINION BELOW.

The opinion of the Supreme Court of Tennessee the petitioners seek to have reviewed is not yet officially published nor unofficially published in the South Western Reporter series but it has been made an appendix to the petition for writ of certiorari in this cause.

STATEMENT OF THE EVIDENCE.

The petitioners appeared at the entrance of the B & W Cafeteria, Sixth Avenue, Nashville, Tennessee, about 12:00 p. m., Sunday, October 21, 1962 (Tr. 765-766) (the letters "Tr." as used in this Statement of the Evidence is an abbreviation for transcript of the record), at a time when the entrance was crowded because of people arriving for lunch after being dismissed from church (Tr. 1068). After being informed by Otis Williams, who was employed by the cafeteria as a doorman that the cafeteria did not serve colored people and that they could not enter, the petitioners insisted, "We are coming in and going to eat when we git in" (Tr. 1070-1071).

Petitioners were asked to move along and not to make any trouble for the restaurant, but they remained in the vestibule area, approximately 4′ x 4′. (The doorman testified that the vestibule was 6′ x 6′ 4″. (Tr. 1070).) Only a few people managed to squeeze through the vestibule (Tr. 768-770). The City Policemen were called and they escorted the petitioners away from the entrance (Tr. 771-772), after they refused to leave otherwise (Tr. 1035).

One of the State's witnesses described the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. And the police came and then they—it was a question of what to do then. I was talking to some of the policemen, and I was a lawyer, and they thought I knew everything and could solve the situation, and I must admit that I didn't know what to do myself."

This same witness testified that after the vestibule of the restaurant was cleared, the crowd inside the restaurant went out and the crowd outside the restaurant entered (Tr. 939).

BRIEF AND ARGUMENT.

Counsel for the petitioners insist six questions are presented in their petition for writ of certiorari to this Honorable Court for determination. The first three of these are to the effect that the petitioners' conviction of an unlawful conspiracy to injure trade and commerce by peaceably protesting their denial to enter and be served by a cafeteria open only to white persons constituted a denial of their right to due process and equal protection as guaranteed by the Fourteenth Amendment, Constitution of the United States.

Counsel for the Respondent, State of Tennessee, does not agree that the protesting of the petitioners was peaceful but on the contrary insists that it was not done in a peaceful manner. The jury who determined the facts in the trial court found that the conduct of the petitioners on this occasion was not peaceful. The trial judge did not find it to be peaceful and the Supreme Court of Tennessee did not find it to constitute peaceful protesting; and this Honorable Court in the case of **Feiner v. People of State of New York,** 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295, did not find very similar conduct to be peaceful as indicated by the following excerpt, 340 U. S. 320, 71 S. Ct. 306, 95 L. Ed. 300:

> "The language of Cantwell v. State of Connecticut, 1940, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to

another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at page 308, 60 S. Ct. at page 905. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. Schneider v. State of New Jersey, Town of Irvington, 1939, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Kovacs v. Cooper, 1949, 336 U. S. 77, 82, 69 S. Ct. 448, 451, 93 L. Ed. 513. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner."

Peaceful protesting in this case is very analogous to peaceful picketing. Peaceful picketing has been defined in **Goldfinger v. Feintuch**, 11 N. E. 2d 910, annotated 116 A. L. R. 477; and **Senn v. Tile Layers Union**, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. In those cases it was held that any form of physical obstruction or interference with business was beyond the realm of peaceful picketing.

The next question presented according to counsel for the petitioners is to the effect that the convictions were based upon a matter not litigated in the trial court. It was insisted at the trial, in briefs before the State Supreme Court, and now in the petition filed with this Honorable Court that the petitioners were denied due process of law and equal protection of the law as guaranteed by the Fourteenth Amendment, Constitution of the United

States, because no determination was made relative to the constitutionality of Section 62-710, Tennessee Code Annotated, which authorizes owners of hotels, etc., to deny entry thereto to any person they desire for any reason whatsoever. Counsel for the State of Tennessee's reply to this insistence is that the petitioners were being tried for their own conduct without regard to the conduct of the B & W Cafeteria management. If their conduct (cafeteria management) was such as to deny petitioners' constitutional rights, the state courts and federal courts are available to the petitioners for a protection of their rights. The petitioners on this occasion were not pursuing such a legal remedy nor any other legal remedy, but, on the contrary, they sought redress of their grievances in an unlawful and unpeaceful manner. Recently, this Honorable Court in the case of **Garner v. State of Louisiana**, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207, held that it could be determined whether or not the conduct of the defendants in that case was lawful or unlawful without deciding whether or not the owners of private property have a right to serve only those whom they choose and refuse to serve others whom they desire not to serve for whatever reason they think sufficient.

The trial judge instructed the jury that the petitioners were guilty of an unlawful conspiracy to injure trade, etc., in violation of Sections 39-1101, 62-710, and 62-711, Tennessee Code Annotated. That portion of his charge regarding Section 62-710, Tennessee Code Annotated, was erroneous. This section of the Code is not a criminal section and, as stated above, was only included in the indictment to show the motive of the petitioners for violation of the other two sections of the Code and, of course, there was no evidence to show that the petitioners were in violation of this civil statute. The instruction was in the nature of a typographical error. However, counsel for the petitioners insist that the inclusion of this statute in

the trial judge's instruction in the manner stated above had the effect of depriving them of the right to due process and equal protection of the law. But, on the other hand, it apparently did not so appear to counsel for the petitioners during the trial of the case since no requested instruction to correct the matter was made, and when the whole charge is considered together, it is submitted that this error, typographical in nature, could not have had the effect of confusing or misleading the jury. See Vol. 23-A, C. J. S. 1320, Inadvertent Errors and Omissions, page 786.

Finally, it is insisted in the sixth question presented by counsel for the petitioners that they were denied due process and equal protection as guaranteed by the Fourteenth Amendment, Constitution of the United States, by being put to trial before white jurors who "admitted personal practice, custom, philosophy and belief in racial segregation." There is no insistence that members of the colored race were systematically excluded from the jury and the record reveals that a number of Negroes were called for jury service but were all excused for one reason or another. (See Appendix Page 11-A to the Petition.) Even though some of the jurors stated on voir dire that they believed in the right of the owner to segregate his restaurant, they all stated that they would set aside their own opinion and decide the case on the evidence and the law, the test universally applied for determining competency of jurors otherwise qualified. The Supreme Court of Tennessee in the case of **Kennedy v. State**, 186 Tenn. 310, has held on this question that members of the Negro race have no constitutional right to a trial by a mixed racial jury but do have a right that members of their race shall not be discriminated against in the selection of juries. (The rule was only applied to the selection of grand juries in the Kennedy case.) This is not inconsistent with the rule announced in other jurisdictions on

this question, including this Honorable Court. **Bush v. Commonwealth of Kentucky**, 107 U. S. 110, 1 S. Ct. 625, 27 L. Ed. 354, and **Hoyt v. Florida**, 368 U. S. 57, 82 S. Ct. 159, 7 L. Ed. 2d 118. See also 116 A. L. R. 1412.

In a discussion of one of the reasons for the granting of the writ, it is insisted that the question presented in this case is "identical with or similar to, issues now pending before this court in other cases where certiorari has been granted . . .". Counsel for the State of Tennessee would point out that there is a wide gulf between the phrases "identical with" and "similar to" and submits that in the cases relied upon by counsel for the petitioners, the protesting was peaceful, but in this case the protest made by the petitioners was not peaceful. Counsel for the State of Tennessee contends that the basic issue in this case is whether or not the protest of the petitioners was peaceful and counsel for the State concedes that if the protests made by the petitioners were peaceful, the petitioners are entitled to the relief they seek and to have their conviction for a conspiracy to unlawfully injure trade and commerce reversed, but, on the other hand if, as is insisted upon by counsel for the State, the petitioners "took the law in their own hands," the conviction should be sustained.

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

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GEORGE F. McCANLESS,
Attorney General,
State of Tennessee,

.....

THOMAS E. FOX,
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I certify that I forwarded a copy of this Reply to Petition for Writ of Certiorari to Mr. Avon N. Williams and Mr. Z. Alexander Looby, Attorneys at Law, Charlotte at Fourth, Nashville, Tennessee, on this the 9 day of June, 1964.

.....

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. McKINNIE, *et al.*,

Petitioners,

—v.—

TENNESSEE,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Supreme Court of Tennessee (R. 315) is reported at —— Tenn. ——, 379 S. W. 2d 214, the opinion of the Supreme Court of Tennessee on petition for rehearing (R. 328) is reported at —— Tenn. ——, 379 S. W. 2d 221. The Criminal Court of Davidson County, Tennessee, Division Two, delivered no opinion (R. 314).

Jurisdiction

The final judgment of the Supreme Court of Tennessee, which is the order denying rehearing, was entered on March 5, 1964 (R. 329). The petition for writ of certiorari was filed June 3, 1964, and granted October 12, 1964 (R. 331).

The jurisdiction of this Court is invoked pursuant to 28 U. S. Code §1257(3), petitioners having asserted below and here denial of rights secured by the Fourteenth Amendment to the Constitution of the United States.

Questions Presented

1. Does the federal Civil Rights Act of 1964 compel the reversal of these convictions, as a matter of federal law?

2. Must these cases be remanded to the state courts for consideration of the effect of the federal Civil Rights Act of 1964?

3. Do these convictions result in the enforcement of racial discrimination against petitioners, with such admixture of "state action" as to bring to bear the equal protection guarantees of the Fourteenth Amendment?

4. Is the record so devoid of any evidence of the essential elements of unlawful conspiracy as to render the conviction for that offense a deprivation of due process of law under the Fourteenth Amendment?

5. Did the action of the trial judge in instructing the jury three times that petitioners were charged with violating a law under which they had not been indicted and which was not even a criminal statute deprive petitioners of due process of law under the Fourteenth Amendment?

6. Did the Supreme Court of Tennessee affirm petitioners' conviction on a ground not litigated in the trial court so as to deny them an appeal which considered the case as it was tried, in violation of the due process clause of the Fourteenth Amendment?

7. Did a trial by an all-white jury, some of whose members admitted personal belief in racial segregation, preclude petitioners having a fair and impartial jury of their peers in violation of due process, and did the trial judge's refusal to dismiss jurors challenged by petitioners for good cause deny petitioners due process of law under the Fourteenth Amendment?

Statutory and Constitutional Provisions Involved

1. This case involves the following provisions of the Constitution:

Article VI, Clause 2;

The Fourteenth Amendment

2. This case also involves the following statutes of the United States:

Civil Rights Act of 1964, Title II, 78 Stat. 243-246, set forth, *infra*, at p. 1a;

1 U. S. C. §109, 61 Stat. 635:

Repeal of statutes as affecting existing liabilities.— The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in

force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

3. This case also involves the following sections of the Code of the State of Tennessee:

39-1101. *"Conspiracy" defined.*—The crime of conspiracy may be committed by any two (2) or more persons conspiring: . . . (7) to commit any act injurious to public health, public morals, trade, or commerce . . .

62-710. *Right of owners to exclude persons from places of public accommodation.*—The rule of the common law giving a right of action to any person excluded from any hotel, or public means of transportation, or place of amusement, is abrogated; and no keeper of any hotel, or public house, or carrier of passengers for hire (except railways, street, interurban, and commercial) or conductors, drivers, or employees of such carrier or keeper, shall be bound, or under any obligation to entertain, carry, or admit any person whom he shall, for any reason whatever, choose not to entertain, carry, or admit to his house, hotel, vehicle, or means of transportation, or place of amusement; nor shall any right exist in favor of any such person so refused admission; the right of such keepers of hotels and public houses, carriers of passengers, and keepers of places of amusement and their employees to control the access and admission or exclusion of persons to or from their public houses, means of transportation, and places of amusement, to be as complete as that of any private person over his private house, vehicle, or private theater, or places of amusement for his family.

62-711. *Penalty for riotous conduct.*—A right of action is given to any keeper of any hotel, inn, theater, or public house, common carrier, or restaurant against any person guilty of turbulent or riotous conduct within or about the same, and any person found guilty of so doing may be indicted and fined not less than one hundred dollars ($100), and the offenders shall be liable to a forfeiture of not more than five hundred dollars ($500), and the owner or persons so offended against may sue in his own name for the same.

1-301—The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

Statement

Petitioners, Lester G. McKinnie, Nathal Winters, John R. Lewis, Harrison Dean, Frederick Leonard, Allen Cason, Jr., John Jackson, Jr., and Frederick Hargraves, were arrested and convicted of unlawful conspiracy after an attempted "sit-in" demonstration at the Burrus and Webber Cafeteria in Nashville, Tennessee.

Around noon on October 21, 1962, petitioners, young Negro college students, entered the front door of the Burrus and Webber Cafeteria (R. 96).[1] Two swinging doors on the sidewalk opened on the vestibule (R. 89), six feet by six feet, four inches (R. 271).[2] Another set of swinging doors led into the dining room (R. 89).

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[1] The cafeteria had a front entrance and a back entrance (R. 124).

[2] Estimates of the size of the vestibule varied from four feet by four feet (R. 89) to twelve feet by twelve feet (R. 170), but Otis Williams, the doorman at the Cafeteria, testified that he measured it as six feet by six feet, four inches (R. 270-271).

Before the petitioners could go through the second doors, the doorman, Otis Williams held them closed and said, "Now, we don't serve colored people in here. I want to be nice to you, but we don't serve 'em . . . and you can't come in" (R. 271).[3] Petitioners remained standing in the vestibule for approximately 20 or 25 minutes when they were arrested (R. 92, 278).[4] People were walking in front of the cafeteria, and estimates of the number of people who stood by or near the outside door of the vestibule varied from three or four to seventy-five or one hundred (R. 97, 101, 113, 126, 178-179, 202, 234). It was not established how many, if any, of those standing outside desired to enter the B. & W. or were just curious observers. No witness testified that they were prevented either from entering or leaving the cafeteria (R. 98, 104, 115, 133, 164-166, 179-181, 187, 197-198, 204, 230, 247, 251). The doorman did testify that some customers on the outside left rather than force their way through the crowd (R. 278, 281). However, he also admitted that several did enter the cafeteria (R. 281).

Several patrons of B. & W. testified that if the doorman had not been holding the door so that the petitioners could not enter, there would have been no congestion (R. 100-101, 165, 228-229).[5] Although the doorman and other witnesses

[3] Williams, a 64 year old man weighing only 140 pounds, held the door and kept petitioners out while allowing white patrons in the vestibule to enter the cafeteria, one at a time through a crack in the door (R. 271, 280, 281). He stated he was hired to keep Negro patrons out (R. 281-282) and was ordered to lock the doors if Negroes came (R. 282). When petitioners arrived, Williams "caught the door going into the cafeteria, and stopped them there, and the white people, too . . . " (R. 269).

[4] The doorman testified that petitioners were there forty or forty-five minutes (R. 272). However, he did indicate that in the excitement he was not able to keep accurate track of the time (R. 278).

[5] Charles Edwards stated:

"Q. If the doorman hadn't blocked the door, they would have gone in the place, so that ingress and egress would have

testified that petitioners were "pushing and shoving" in the vestibule (R. 168, 169, 214, 278-280),[6] their evidence indicated that this was occasioned in part by white patrons coming through the crowded vestibule (R. 175-177, 279-280). All the witnesses entered the cafeteria, although a few spoke of having to "elbow" or "push" their way through (R. 116-117, 187). Others entered with little difficulty (R. 109, 164).[7]

One witness testified that as she approached the restaurant she heard someone say, "When we get there, just keep pushing. Do not stop. Just keep on pushing," that she looked around and saw a group of Negroes who passed her

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been free? Wouldn't it? A. I suppose so, if he had wanted Negroes in, too.

Q. Yes, sir, the doorman was blocking them so that they couldn't get in? A. The doorman was holding the door, and the Negroes were blocking the vestibule so that people couldn't get in there.

Q. . . . The doorman was the one who was blocking the door and keeping people out? . . . A. He was holding the Negroes out, and as a result, they had the vestibule blocked, and the other people could not get by" (R. 100-101).

[6] The evidence of the doorman was the strongest against petitioners. He testified that they pushed white persons up against the wall and doors (R. 271, 280, 289), that they were acting "brutish" (R. 289), and that one tried to force his way in (R. 289-290).

[7] Mrs. Charles Edwards testified that she "just went right in" (R. 109). Mickey Lee Martin testified:

"Q. You had no trouble getting in? A. No, sir.

Q. Did you have to ask them to let you in? A. Sir?

Q. Did you have to ask these colored people to let you in? A. Yes, sir.

Q. And did they let you in? A. Yes, sir, they let me in" (R. 164).

Patrolman Pyburn testified that after petitioners were standing four on either side of the vestibule "a person medium size could get in" (R. 245-246).

on the street and entered the restaurant (R. 210-211, 219-222).[8]

W. W. Carrier, Manager of B. & W., testified that informed of petitioners' presence, he went to the front door (R. 89) and "discovered a large gathering of people . . . on the outside, and eight young Negroes were in the vestibule, in between the two doors" (R. 89). Carrier did not speak to petitioners at that time (R. 91). He called the police and went outside to wait for them (R. 92). He testified:

> Q. As you attempted to pass through the vestibule, what, if anything, occurred? A. Well, actually nothing, sir. The—the young men were standing in position, and it was just a matter of my easing through the crowd (R. 92).

Petitioners informed him that they were seeking service (R. 94), but Carrier refused because they were Negroes[9] (R. 95). At no time did he directly order petitioners to leave.[10] His sole comment was to request that they move back and let a lady get out which petitioners did (R. 93). He admitted that persons were able to get in and out of the cafeteria (R. 91).

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[8] See also testimony at R. 223, 225.

[9] On cross-examination Carrier stated:

"Q. You have the facilities to serve them? A. We do have.

Q. Was your place of business crowded at the time? A. It was beginning to be crowded, sir.

Q. Now, the only reason that you didn't serve them was because they were Negroes and not white, wasn't it? A. Yes, sir.

Q. And the same boys, seeking service would have been all right if they were white? A. Yes, sir" (R. 95).

[10] Carrier testified he did not swear out warrants against petitioners and had no idea how his name appeared on them as prosecutor (R. 123).

The police arrived shortly after 12:20 and arrested petitioners (R. 126, 129). They were charged under a grand jury presentment [11] (R. 1-5) alleging that they:

> [O]n the 21st day of October, 1962, and prior to the finding of this presentment, with force and arms, in the County aforesaid, unlawfully, willfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate, between and among themselves, to violate Code Section 39-1101-(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 Sixth Avenue North, Nashville, Davidson County, Tennessee (R. 2).

The indictment also alleged that the B. & W. Cafeteria had a policy of not admitting Negroes, that this policy was carried on under rights established by Tennessee law, that there were integrated restaurants in Nashville known to petitioners, and that petitioners wilfully and deliberately conspired to conduct "sit-ins" at various white-only restaurants in furtherance of the integration movement of which they were a part (R. 3-4).

Petitioners were tried together in the County Court of Davidson County, Tennessee. After conviction of unlawful conspiracy (R. 15) they were sentenced to ninety days in jail and fifty dollars fine [12] (R. 16). Appeals were taken to

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[11] Petitioners were arrested without warrants by Nashville police officers and originally charged with violating City Code Chapter 26, Section 59 (state law regarding sit-ins) (R. 160). Later in the same day, warrants were issued charging them with unlawful conspiracy. The grand jury presentment was made on December 12, 1962 (R. 1).

[12] The jury suggested a fine of less than fifty dollars (R. 313) but the judge later imposed the severer sentence.

the Supreme Court of Tennessee which affirmed the convictions (R. 326) and denied a petition to rehear (R. 329).

Summary of Argument

I.

The Civil Rights Act of 1964, Title II (Public Accommodations), compels the reversal of these cases and their remand for dismissal, both under the doctrine expounded in *Bell* v. *Maryland*, 378 U. S. 226, and by virtue of §203(c) of the Civil Rights Act of 1964, forbidding "punishment" of acts such as those here shown to have been committed. The federal and common-law doctrine of abatement of criminal prosecutions, on removal of the taint of criminality, here applies.

Moreover, it is clear, under the holding in *Bell* v. *Maryland, supra*, that this case must at least be remanded to the state court for consideration of the abating effect of the Civil Rights Act under state law, since that Act is part of the law of every state.

II.

This case involves the use of state power to effect racial discrimination, contrary to the equal protection clause of the Fourteenth Amendment.

In Tennessee at the time of the prosecutions discrimination was expressly permitted under statute. Petitioners, after attempting to seek service in a white-only cafeteria, were prosecuted under a presentment that characterized their integration movement as an unlawful conspiracy. Thus, the State adopted the posture of supporting and enforcing segregationist policies, and, under the rule of *Lombard* v. *Louisiana*, 373 U. S. 267, denied petitioners the

equal protection of the laws in violation of the Fourteenth Amendment.

III.

These convictions deny due process of law in that the record is devoid of evidence of the essential elements of the crime charged, unlawful conspiracy.

Under Tennessee law, it is necessary to prove both an agreement and an overt act in order to convict for conspiracy. All the evidence in this case shows, however, is that petitioners went to a cafeteria to attempt to obtain service, were barred from entrance after they had gone into a small vestibule, and that the resulting congestion made it inconvenient for other patrons to enter.

The lack of evidence that they agreed or intended to obstruct the doorway or to disrupt the cafeteria's business in any way requires that the convictions be reversed, under the rule in *Garner* v. *Louisiana*, 368 U. S. 157.

IV.

Petitioners were denied due process in that the trial judge instructed the jury that they were charged with violating a statute when no such charge was in the indictment, and the statute was civil, not criminal.

The Supreme Court of Tennessee admitted that the trial judge erred in instructing the jury that petitioners were charged with conspiracy to violate a statute that merely removed the old common law duty of innkeepers and others to serve all patrons. The court, however, dismissed the error as insubstantial because there was ample evidence for a conviction on the other charges.

However, this court has held that where a jury renders a general verdict, as was done here, and the instructions were

erroneous, particularly as to the statutes under which the defendants were charged, the convictions must be reversed since it is impossible to tell the effect the error had on the jury's determination. *Terminiello* v. *Chicago,* 337 U. S. 1; *Stromberg* v. *California,* 283 U. S. 359.

V.

Petitioners were denied due process by the Supreme Court of Tennessee affirming their convictions on a theory other than that under which the cases were presented to the jury.

The presentment and the judge's instructions made the right of the cafeteria to discriminate a central issue in this case, so that an aura of illegality was cast over petitioners' attempt to gain equal service. The Tennessee Supreme Court, however, based its decision on the assumption that the question of a right to segregate was not present. This action violated the rule established in *Cole* v. *Arkansas,* 333 U. S. 196, that a defendant is entitled to have his case decided by a state appellate court on the same basis on which it was presented at trial.

VI.

Petitioners were denied a fair and impartial jury contrary to due process of law and equal protection of the laws secured by the Fourteenth Amendment.

The presentment made the right to operate a segregated establishment a central issue in the case. However, the trial judge refused petitioners the right to challenge for cause veniremen who stated that they believed in the right to discriminate. Therefore, the jurymen began prejudiced against the petitioners, in violation of the rule stated in *Aldridge* v. *United States,* 283 U. S. 308.

ARGUMENT

I.

The Enactment of the Civil Rights Act of 1964, Subsequent to These Convictions But While They Were Still Under Direct Review, Makes Necessary Either Their Outright Reversal or a Remand to the State Courts for Consideration of That Act.

A. *The Civil Rights Act of 1964 Abates These Prosecutions as a Matter of Federal Law, and These Cases Should Be Reversed on That Ground.*

The federal Civil Rights Act of 1964, 78 Stat. 241, went into effect on July 2, 1964. The B. & W. Cafeteria comes within the terms of Title II, providing for equal enjoyment of public accommodation, since, being open to the general public (R. 94) it served or offered to serve interstate travelers.[13] Therefore, the petitioners would have had federal statutory protection in seeking service if they had acted after passage of the act.

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[13] Civil Rights Act of 1964, Title II, Section 201 . . .

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action: . . . (2) Any restaurant, *cafeteria,* lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, ...

* * * * *

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), *it serves or offers to serve interstate travelers* or a substantial portion of the food which it serves . . . has moved in commerce; . . . [Emphasis added].

Moreover, Section 203(c) of the Act provides, "No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." Assuming, for the moment only, that petitioners were prosecuted for attempting to exercise 201 rights, this section clearly would bar the commencement of any prosecution if the incident here had taken place after July 2, 1964. It would also bar prosecutions or existing punishments begun before that date, since the section bars punishment of rights "secured" by the Act. In other words, the Act does not only create new rights, but also protects rights already in existence.

In addition to the wording of section 203(c), these prosecutions also should cease under the Federal rule that a change in the law, prospectively rendering that conduct innocent which was formerly criminal, abates prosecution on charges of having violated the no longer existent law. See *Bell* v. *Maryland*, 378 U. S. 226, 231, n. 2; *United States* v. *Chambers*, 291 U. S. 217; *United States* v. *Tynen*, 78 U. S. (11 Wall.) 88. And under the supremacy clause of the Constitution (Article VI, clause 2), a federal statute has the same abative effect on a state criminal proceeding.[14]

Turning to the application of these principles to the case at hand, it is clear that the character of the presentment is of central importance. If the petitioners had simply been prosecuted for disorderly conduct, it would have been difficult to say that they were being punished for "attempting to exercise" rights secured by section 201. However, in the presentment the state charged that petitioners knew that the B. & W. Cafeteria had a policy of racial segregation (R. 3), and that they "unlawfully, willfully, . . . and in-

[14] These are the same arguments made in more detail for petitioners in *Hamm* v. *City of Rock Hill*, No. 2, October Term, 1964, Brief for petitioners, pp. 18-41.

tentionally" united and conspired to conduct "sit-ins" in order to try to compel the owners to serve them on a non-segregated basis (R. 3-4).

Thus, in the guise of a prosecution for conspiring to obstruct commerce and commit disorderly acts, the state has set out to punish petitioners for attempting to gain rights protected by the 1964 Act.

For these reasons, these prosecutions must be abated as a matter of federal law.

B. *The Least Possible Consequence in This Case, of the Rule Announced in* Bell v. Maryland *Is Its Remand to the State Court, for Consideration There of the Effect of the Enactment of the Federal Civil Rights Act of 1964.*

In *Bell* v. *Maryland*, 378 U. S. 226, decided at the last term of this Court, it was held that the enactment of a state public accommodations law, subsequent to the commission of the alleged offenses but while the convictions were still under review, made appropriate a remand to the state courts, for consideration of the question whether, within the framework of the state common and statutory law, such intervening enactment destroyed the legal basis for prosecution and made dismissal appropriate. This action was taken by this Court after careful consideration both of the general common law rule and of the Maryland general "saving clause," 1 Md. Code §3 (1957), see *Bell* v. *Maryland*, *supra*, 378 U. S. at pp. 230-234, 236, 237.

The federal Civil Rights Act besides being a permanent federal law, is a part of the law of each state.

> It must always be borne in mind that the Constitution, laws and treaties of the United States are as much a part of the law of every state as its own local laws and Constitution. This is a fundamental principle in our system of complex national polity. See also Shanks v.

> Dupont, 3 Pet., 242; Foster v. Neilson, 2 Pet., 253; Cherokee Tobacco, 11 Wall., 616; Mr. Pinkney's Speech, 3 Elliot's Const. Deb. 231; People v. Gerke, 5 Cal., 381. (*Hauenstein* v. *Lynham,* 100 U. S. 483, 490.)

For the narrower application of the *Bell* holding the position, therefore, must be taken to be the same as it would be if Tennessee had, while these prosecutions were pending, enacted laws exactly equivalent, in tenor and effect, to the federal Civil Rights Act.

Tennessee has a general "saving clause" statute, Tenn. Code Ann. §1-301:

> The repeal of a statute does not affect any right which accrued, any duty imposed, any penalty incurred, nor any proceeding commenced, under or by virtue of the statute repealed.

The application of this statute to the saving of these prosecutions is even more dubious than that of the Maryland statute, *Bell* v. *Maryland, supra,* for the Tennessee statute speaks only of "repeal," where the Maryland statute speaks of "amendment" as well, see *Bell* v. *Maryland, supra,* 278 U. S. 226 at pp. 234-5, and the operation of a public accommodations statute, forbidding racial discrimination, upon a general trespass law, more nearly resembles "amendment" than "repeal," though (as the Court points out in *Bell*) neither word may be apt.

As to this case, therefore (even on the assumption, which is contrary to fact, see Point I-A *supra,* that the abating effect of the Civil Rights Act is to be taken to be solely a state-law question), the least effect of *Bell* must be reversal and remand for consideration of the question whether the Civil Rights Act, in its section quoted above, has the effect of abating these prosecutions.

II.

Petitioners' Convictions Enforced Racial Discrimination in Violation of the Fourteenth Amendment to the Constitution of the United States.

If it could be assumed (as apparently it was by the Supreme Court of Tennessee) that this case involved simply prosecutions for conspiracy to commit an act injurious to commerce under §39-1101 and conspiracy to commit turbulent or riotous conduct under §62-711, then the main question would be the sufficiency of the evidence supporting those charges (See Part III, *infra*). However, by the way it framed the presentment, the State has put itself in the posture of directly enforcing racial discrimination.

The presentment recited at some length that the owners of the B. & W. Cafeteria had a rule that they would serve only white customers, and that this policy was allowed under the provisions of the Tennessee Code (R. 2-3). It charged that petitioners knew of this practice, and deliberately embarked on a program of "sit-ins" for the purpose of forcing owners to integrate their restaurants (R. 3, 4). The participation in this integration movement was characterized as an "unlawful conspiracy," and the disturbance involved in this case was termed "an overt act" (*Ibid.*).

Thus, the emphasis of a case that could have been presented simply as one of a group of persons obstructing a doorway, was shifted radically to one of enforcement of racial discrimination. The jury must have believed that the case involved the maintenance of a segregated establishment, and they must have regarded themselves as the enforcers of the B. & W.'s policies. Moreover, the judge's charge could only have reinforced this belief; he read the presentment and the text of the statute giving the B. & W. the right to discriminate, and told the jury that petitioners

were charged with conspiracy to violate that statute (i.e., to violate the owner's right to run a segregated cafeteria).

Since the State, through its agents, the prosecutor, grand jury, and judge, decided to frame the case as to involve itself in the enforcement of the segregationist policies of the B. & W., it cannot now claim that all that was involved was a simple prosecution for conspiracy to commit disorderly conduct. This case, therefore, is analogous to *Lombard* v. *Louisiana*, 373 U. S. 267, where there was also no ordinance or state law specifically requiring segregation. Sufficient state involvement was found in pronouncements by city officials that "sit-ins" would not be allowed, followed by prosecutions for trespass. Here, there was a statute clearly designed to allow segregation, since it abrogated the long established common law rule that prohibited discrimination in certain businesses. And although there was no action before the arrests, as there was in *Lombard*, the prosecutor and grand jury did act as enforcers of private discrimination by making the maintenance of segregated facilities a main issue in the case. In so doing, the state denied petitioners the equal protection of the laws in violation of the Fourteenth Amendment.

In addition, the convictions here must fall under the rule of *Shelley* v. *Kraemer*, 334 U. S. 1. Tennessee has a statute, §62-710, which is specifically designed to permit racial discrimination. The State, moreover, has used its prosecutor and its courts to actively enforce the permitted custom of segregation. As *Shelley* made clear, such employment of any branch of the state is a violation of the equal protection clause of the Fourteenth Amendment. The action of petitioners was like that of other "sit-in" demonstrators, and the state may not evade the duty imposed by *Shelley* simply by characterizing the prosecution as one for conspiracy to commit a disorderly act or to interfere with commerce.

III.

Petitioners' Convictions Deny Due Process of Law Because They Are Based on No Evidence of the Essential Elements of the Crime of Unlawful Conspiracy.

The presentment under which petitioners were charged alleged that they:

> . . . with force and arms, unlawfully, willfully, knowingly, deliberately, and intentionally, did unite, combine, conspire, agree and confederate between and among themselves, to violate Code Section 39-1101(7) and Code Section 62-711, and unlawfully to commit acts injurious to the restaurant business, trade or commerce of Burrus and Webber . . . (R. 2).

In its opinion the Supreme Court of Tennessee stated:

> Section 39-1101, T. C. A., makes it a misdemeanor for two or more persons to conspire to do an unlawful act. In order for the offense to be indictable, it must be committed *manu forti*—in a manner which amounts to a breach of the peace or in a manner which would necessarily lead to a breach of the peace (R. 318).

The court further stated that:

> . . . [C]onspiracy may be inferred from the nature of the acts done, the relation of the parties, the interest of the alleged conspirators, and other circumstances; and that such a conspiracy consists of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object, which although not criminal or unlawful in itself, is pursued by unlawful means, or the combination of two or more persons to do something unlawful, either as a means or as an ultimate end (R. 319).

Under Tennessee law, as under that of most jurisdictions, the elements of a conspiracy are an agreement between two or more persons to commit an unlawful act, and the commission of some overt act in furtherance of the plan.[15] In this case there would be two possible unlawful acts that the petitioners agreed to do: first, to seek service at a white-only cafeteria; and second, to obstruct passage into the cafeteria by jamming the vestibule.

Since the Supreme Court of Tennessee acknowledged that an agreement to try to integrate a cafeteria could not be an unlawful conspiracy (R. 322), the State had to produce evidence of an agreement to try to force service by illegal means, *viz.*, the deliberate obstruction of the entrance way.[16] This burden, however, was not met. The only direct evidence of a conspiracy was the testimony of two witnesses that they heard one of the petitioners say, as the group approached the B. & W., that when they got there or when they started in, they should keep going, keep pushing, and not stop (R. 210-211, 219-222, 223, 225).

Even assuming that the other members of the group agreed to this course of action, the statement is still no evidence of a conspiracy to obstruct or interfere with the cafeteria entrance. The statement can only mean that petitioners had decided to enter the cafeteria even though some attempt might be made, whether by the management

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[15] For construction of the Tennessee conspiracy statute see: *Delaney* v. *State*, 164 Tenn. 432, 51 S. W. 2d 485 (1932) (Persons must unite and agree to pursue an unlawful enterprise); *Cline* v. *State*, 204 Tenn. 251, 319 S. W. 2d 227 (1958) (gist of conspiracy is agreement to effect unlawful end, but, before offense is complete, party to conspiracy must commit some "overt act").

[16] The mere showing that a disorder took place, or even that petitioners might have been guilty of disorderly conduct would not be enough, since conspiracy was charged. *Cole* v. *Arkansas*, 333 U. S. 196.

or white customers, to deter them. In other words, the statements show a resolution to seek service and use the cafeteria facilities, and give no support to any intention to obstruct their use by any other customers.

Under Tennessee law conspiracy may also be inferred by circumstantial evidence; however, for such an inference to be drawn, the standard of sufficiency of evidence applicable in *Garner* v. *Louisiana*, 368 U. S. 157, must be met. The testimony s rial here does not support the conclusion that petitioners had agreed to obstruct the entrance or do any other disorderly act.

In the first place, the doorway was not in fact blocked to the extent that no one could enter; witnesses testified either that they were able to make their own way through the crowd (R. 91, 92, 109, 245-246, 251), or that petitioners stepped aside when asked (R. 93, 164). Indeed, the evidence is clear that what actually caused obstruction and crowding in the vestibule was the fact that the doorman would not let the petitioners in; the testimony of a number of witnesses showed that if he had opened the door there would have been no difficulty (R. 100-101, 165, 228-229, 281).

Morover, no witness testified that petitioners committed any disorderly act or acts which constituted a breach of the peace, or that violence occurred or was even threatened. They used no bad language (R. 226) and did not force themselves past the doorman who held the door, something they could easily have done, considering his size and weight (R. 276). Petitioners were not "ugly" or "disrespectful" but were, as one witness testified, "just there" (R. 108-109). Although they were told "we don't serve colored people in here" and "you can't come in," no one asked them to leave the vestibule, where they remained until they were arrested.

Two witnesses testified that petitioners were "pushing" and "shoving" (R. 168, 214). However, it was not established whether this pushing and shoving resulted from the natural congestion in the vestibule caused by the doorman's blocking the door or by petitioners' actions alone. Moreover, a few white patrons stated that they "pushed" inside the vestibule. One man testified that he "kind a pushed" his way in (R. 136) and another testified that he "push[ed] my way through with my boy . . . I did a little pushing" (R. 187).

Not only, therefore, was there no evidence that petitioners conspired to commit an unlawful act, the record solidly refutes the Supreme Court of Tennessee's conclusion that the means employed were unlawful.

This case is not materially different from the ordinary "sit-in" cases, where Negroes have been convicted for trespass after remaining at lunch counters when requested to leave by restaurant owners, solely because of race. No constitutional difference exists between sitting quietly on a lunch stool and standing quietly in a vestibule to protest racial discriminaton. This court has found no problem in reversing "sit-in" convictions based on no more evidence than the Negroes' "mere presence" at white restaurants. *Garner* v. *Louisiana*, 368 U. S. 157. Here as in *Garner*, the petitioners were not ordered to leave by the restaurateur or his employees.

It has been recognized that a Negro sitting at a lunch counter in a southern state to protest racial segregation is engaged in a type of expression protected by the Fourteenth Amendment. *Garner* v. *Louisiana, supra* (Mr. Justice Harlan, concurring). If, therefore, petitioners' conduct is construed to constitute an unlawful conspiracy, then the statute under which they were charged and convicted is unconstitutionally vague in that it failed to warn

petitioners that it was unlawful to quietly remain in a cafeteria vestibule and because, if so construed, it limits petitioners' right of free expression. *Garner* v. *Louisiana, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Winters* v. *New York,* 333 U. S. 507, 509.

In summation then, the evidence shows only that: petitioners agreed to go to the B. & W. Cafeteria to attempt to secure non-segregated service there; when they arrived their entrance was blocked by the doorman (there was no evidence that they should have expected this to happen); during the time they were trying to get in the resulting congestion made it inconvenient for white patrons to enter or leave, although none was prevented from doing so; this situation existed for only a brief time, 20 or 25 minutes, until the police arrived; petitioners co-operated fully with the officers, both in standing on both sides of the vestibule and in leaving. The record is totally devoid of any evidence indicating that they either had agreed to obstruct the doorway beforehand or even that they wanted or tried to after they arrived.

Because there is no evidence to support the charges of unlawful conspiracy, the convictions deny petitioners due process of law. *Thompson* v. *Louisville,* 362 U. S. 199; *Garner* v. *Louisiana,* 368 U. S. 157.

IV.

Petitioners Were Denied Due Process in Violation of the Fourteenth Amendment When the Trial Judge Instructed the Jury That Petitioners Were Charged With Violation of a Statute When (a) Petitioners Had Not in Fact Been Indicted for Violation of the Statute and (b) It Was Not Even a Criminal Statute.

Petitioners were indicted for unlawfully conspiring to violate Sections 39-1101(7) (act injurious to commerce) and 62-711 (riotous conduct) of the Code of Tennessee. After reading the presentment to the jury, the judge read them the texts of not only the two above sections but also that of Section 62-710 (R. 298). This section abrogates the rule of the common law imposing a duty on innkeepers, etc., to serve all persons, and allows them to exclude anyone for any reason. He then, on three occasions, told the jury that petitioners were charged with conspiracy to violate not only Sections 39-1101(7) and 62-711, but also Section 62-710.[17]

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[17] The trial judge told the jury (R. 299):

> You will note from the language of the presentment that the defendants are charged with the offense of unlawful conspiracy to violate Code Section 39-1101(7), Code Sections 62-710 and 62-711, in that they did unlawfully commit acts injurious to the restaurant business, trade and commerce of Burrus & Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee.

And also at (R. 302-303) he said:

> . . . If you find and believe beyond a reasonable doubt that the said defendants unlawfully, wilfully, knowingly, deliberately, and intentionally did unite, combine, conspire, agree and confederate between and among themselves, to violate Tennessee Code Section 39-1101-(7) and Code Sections 62-710 and 62-711, and unlawfully to commit acts injurious to the restaurant business, trade and commerce of Burrus and Webber Cafeteria, Inc., a corporation, located at 226 6th Avenue North, Nashville, Davidson County, Tennessee, as

Petitioners' motion for a new trial, urging this as a denial of due process, was overruled (R. 18-19, 27).

It is clear that §62-710 itself could not form the basis for a criminal charge of any sort. It merely changes a rule of the common law and is not a penal statute. Moreover, the state could not punish someone for conspiring to violate the section, since the section imposes no duties. It merely says that innkeepers may refuse to serve, if they choose; it says nothing about other persons seeking service, even from a reluctant owner. Indeed, the Supreme Court of Tennessee acknowledged that the statute was civil and the judge's charge was error (R. 321).

The instruction to the jury that they could convict petitioners on a charge not capable of being made, clearly violated petitioners' right to due process of law. In *Stromberg* v. *California*, 283 U. S. 359, a conviction based on a general verdict under a state statute was set aside because one part of a statute submitted to the jury was unconstitutional. In *Terminiello* v. *Chicago*, 337 U. S. 1, the court in instructing the jury about a city ordinance did so on a theory which permitted conviction on an unconstitutional basis.

In addition, even if §62-710 might form the basis of a criminal charge, it could not be used in this case since the presentment was not brought under it.[18] It is clear that a

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charged in the presentment, then it would be your duty to convict the defendants; provided, that they, or one of them, did, in pursuance of said agreement, or conspiracy, do some overt act to effect the object of the agreement; that is, if you find that said agreements and acts in the furtherance of said objective were done in Davidson County, Tennessee.

See also, R. 305.

[18] The presentment mentions §62-710 but the petitioners were specifically charged under §§39-1101(7) and 62-711 (R. 2). As will be discussed *infra*, however, the presentment does add to the confusion resulting from the judge's charges.

defendant may not be convicted for one offense after having been indicted for another. *DeJonge* v. *Oregon*, 299 U. S. 353. Cf., *Cole* v. *Arkansas*, 333 U. S. 196; *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339.

The Supreme Court of Tennessee rejected these arguments, saying that the charge, even though error, could not have been harmful since there was ample evidence to convict the defendants of the offenses defined in the other code sections (R. 321). However, this conclusion overlooked the nature of the case and the presentment involved. The jury's verdict was a general one, viz., "guilty of unlawful conspiracy" (R. 15). It is impossible from this to ascertain what the jury believed petitioners were guilty of conspiring to do. The presentment itself referred to §62-710 and described at some length the practices of the B. & W. Cafeteria in excluding Negroes; it also stated that the owners of the B. & W. had the right to discriminate under Tennessee law (R. 3). The presentment recited that the petitioners were engaged in "a movement to coerce, compel, and to intimidate owners of restaurants . . . and cafeterias serving only white persons to 'integrate'" against the policy established by virtue of §62-710 (R. 3, 4).

Thus, from the presentment alone the jury could have been confused and under the impression that petitioners, by the mere act of attempting to integrate against the wishes of the B. & W., were committing an unlawful act. Such an impression could only have been affirmed by the judge's instruction, which specifically stated that petitioners were charged with conspiring to violate the section giving the B. & W. the right to discriminate. Since the jury's verdict does not indicate what in fact was the basis for its decision, the possible prejudicial effect of the judge's charge cannot be ignored. *Stromberg* v. *California*, 283 U. S. 359; *Termi-*

niello v. *Chicago*, 337 U. S. 4. Cf., *Hamilton* v. *Alabama*, 368 U. S. 52; *Cole* v. *Arkansas*, 333 U. S. 196.

The State Supreme Court's statement that "there were no questions raised following the charge about the propriety of reading it [§62-710]" misses the mark on several counts. First, the petitioners sought and were refused an instruction, contrary to the one given, to the effect that notwithstanding §62-710, the restaurant had no right to exclude them (R. 310). Secondly, they did object, by motion for new trial, to the reading of this statute (R. 18-19). Thirdly, they also objected, on due process grounds, to the trial judge's misstatement of the offense charged in the motion for new trial (R. 19). Finally the stated ground of decision below was "harmless error" and not any theory that the objection was not timely. In any event there were no objections made to the instructions given in *Stromberg supra*, and *Terminiello, supra*.

V.

Petitioners Were Denied Due Process in That Their Convictions Were Affirmed on a Ground Not Litigated in the Trial Court.

The petitioners were tried and convicted under a grand jury presentment which was drawn on the theory that the B. & W. Cafeteria was legally entitled under Tennessee law (§62-710) to exclude petitioners because of their race (R. 2-3). The trial judge read the presentment and also §62-710 to the jury (R. 292-295; 298), and refused a requested instruction that the cafeteria had no legal right to exclude persons because of race (R. 310). Moreover, because the judge instructed the jury that petitioners were charged with conspiracy to violate §62-710 (*i.e.*, to violate the cafeteria's right to discriminate), the jury must have considered that a right to segregate was a central issue.

However, the Tennessee Supreme Court decided the case on the assumption "for the sake of argument that discrimination based on race by a facility such as this cafeteria does violate the due process and equal protection clauses" (R. 318-319). The court asserted that the only question, given this assumption, was whether the method that petitioners adopted was illegal (R. 319). The Supreme Court of Tennessee disposed of the claimed trial error in refusing an instruction that the cafeteria had no legal right to refuse service on the basis of race by saying (R. 322):

> As we have heretofore said, this question is not the issue in this case, and was not the basis of the indictment and conviction. Even if we assume that the owner of the cafeteria had no right to exclude these defendants, this does not excuse their conduct in blocking this narrow passageway.

However, the case was submitted to the jury on the theory that the petitioners had lawfully been excluded from the B. & W. Cafeteria because of their race. Thus, the affirmance of the conviction was on a theory that did not take into account the issue that was inextricably bound into the presentment and the charge to the jury.

It is obvious that the jury might have found the petitioners not guilty if it had been instructed that the B. & W. Cafeteria had no legal right to exclude petitioners because of race, and that it violated their rights when it did so. Moreover, the jury was not instructed to consider the issue which the State Supreme Court did decide, *i.e.*, assuming petitioners had a right to enter the cafeteria, was their method of seeking to vindicate that right unlawful.

Since the basis for affirming the convictions was not the same as that under which the convictions were rendered,

the decision of the Tennessee Supreme Court must be reversed under the holding of *Cole* v. *Arkansas,* 333 U. S. 196, 202:

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.

VI.

Petitioners Were Denied a Fair and Impartially Constituted Jury Contrary to Due Process of Law and Equal Protection of the Laws Secured by the Fourteenth Amendment to the United States Constitution.

Almost without exception, the white veniremen, including some of the twelve persons who tried and convicted petitioners, upon extensive examination by petitioners' counsel during *voir dire,* admitted a firm and life-long practice, custom, philosophy and belief in racial segregation (R. 32-39, 44-46). Most of the veniremen expressed belief that a restaurant owner had a right to exclude anybody, including Negroes, from his place of business.

Despite this fact, the trial judge in a number of instances overruled petitioners' chailenges for good cause and held certain white jurors competent (R. 38, 46, 68, 80, 85-86). For instance, Herbert Amic was held competent by the trial court over petitioners' challenge after testifying:

> Q. But you think that a business open to the public should be allowed to exclude Negroes? A. If they so desire, yes.
>
> Q. A restaurant business, then specifically,—in particular? And having that opinion wherein the indictment in this case charges that the B. & W. Cafeteria

had had such a rule, and that these defendants went there and sought service, knowing that the B. & W. had such a rule and then you would start out with a prejudiced attitude toward these defendants? A. Well, I would—

Q. By reason of your belief? A. I would believe the B. & W. would be right in this case on their position.

Q. And you would start—what I am saying, though, is you would start out in this case with a prejudiced attitude toward the defendants, wouldn't you? A. In this particular case, I imagine I would (R. 56-57).[19]

Similarly, the trial court held competent other jurors, over petitioners' objections for cause, who testified that their entire lives and all their personal associations had been on a segregated basis without any contact with Negroes on a basis of equality (R. 78-80, 84-85).

In the case at bar, where the very issue to be tried was the right of a restaurateur to exclude persons on the basis of race, the trial judge's failure to exclude these jurors with admittedly preconceived notions against Negroes and in favor of B. & W.'s practice of racial segregation, was highly prejudicial and denied petitioners' right to trial by a fair and impartial jury.

This Court has repeatedly recognized that "the American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the

[19] Mr. Amic did testify later that he was not prejudiced against Negroes as such (R. 61), and that he could render a fair and impartial verdict (R. 61-62). However, the real question is not whether he was prejudiced against Negroes, but whether his opinion on an element in the case made crucial by the way the presentment was framed would make a fully impartial judgment unlikely.

community." *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 220; *Smith* v. *Texas*, 311 U. S. 128, 130; *Glasser* v. *United States*, 315 U. S. 60, 85. This Court has also recognized that racial prejudice is a valid ground for disqualification of a juror; in *Aldridge* v. *United States*, 283 U. S. 308, it was said:

> . . . [T]he question is not as to the civil privileges of the Negro, or as to the dominant sentiment of the community and the general absence of any disqualifying prejudice, but as to the bias of the particular jurors who are to try the accused. If in fact, sharing the general sentiment . . . one of them was shown to entertain a prejudice which would preclude his rendering a fair verdict, a gross injustice would be perpetrated in allowing him to sit (283 U. S. at 314).

It is clear that the jurors described above and declared competent by the trial court were incapable, by virtue of their segregationist beliefs, to render petitioners a fair and impartial verdict and that their presence as jurors prejudiced petitioners' right to an unbiased trial. Such action denied due process as well as equal protection of the laws. The test established in *Aldridge, supra,* is more than met here.

CONCLUSION

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

Respectfully submitted,

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TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

Equal access.

SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

Establishments affecting interstate commerce.

(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

Lodgings.

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

Restaurants, etc.

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

Theaters, stadiums, etc.

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

Other covered establishments.

(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

Operations affecting commerce criteria.

(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

"Commerce."

Support by State action.

(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

Private establishments.

(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available

to the customers or patrons of an establishment within the scope of subsection (b).

Entitlement.

SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

Interference.

SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

Restraining orders, etc.

SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

Attorneys' fees.

(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

Notification of State.

(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

Community Relations Service.

(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided*, That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further*, That upon expiration of such sixty-day period, the court may extend such period for an additional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

Hearings and investigations.

SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204(d) and may hold such hearings with respect thereto as may be necessary.

The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

Suits by Attorney General.

SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending.

Designation of judges.

Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited.

Appeals.

An appeal from the final judgment of such court will lie to the Supreme Court.

In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

District courts, jurisdiction.

SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

rcement.

(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 148

LESTER G. MCKINNIE, *et al.*,

Petitioners,

—v.—

TENNESSEE.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

On December 14, 1964, after petitioners' brief was filed, this Court decided *Hamm* v. *City of Rock Hill*, 379 U. S. 306. The purpose of this reply brief is to discuss the applicability of that decision, and to reply to arguments made by the Respondent.

I.

The Civil Rights Act of 1964 Abates These Prosecutions.

After certiorari was granted in this case,[1] and after petitioners' brief was filed, this Court held in three cases that the Civil Rights Act of 1964, Title II, requires that convictions in pending prosecutions similar to this one be vacated and the indictments dismissed. *Hamm* v. *City of Rock Hill* (and *Lupper* v. *Arkansas*), 379 U. S. 306; *Blow* v. *North Carolina*, —— U. S. L. Week —— (Feb. 1, 1965). These

[1] 379 U. S. 811, October 12, 1964.

decisions rested on the ancient common law doctrine of abatement, and on the language and purposes of the Act, including particularly §203(c).[2] We respectfully submit that notwithstanding the fact that these decisions were not unanimous (see dissenting opinions in *Hamm*, 379 U. S. at 318, et seq.), the holding of the Court with respect to the meaning and effect of this important act of Congress should now be accepted as *stare decisis*. Tennessee has not challenged the basic ruling of *Hamm, supra*, but has attempted to show that this case is different (State's Brief, pp. 5-8).

We contend that the State's attempted distinctions fail, and that a holding distinguishing *Hamm* on the grounds suggested on this record would substantially undermine the effectiveness of the Civil Rights Act as applied to criminal convictions for acts done before and since passage of the Act.

First, it should be noted that Tennessee has not argued that the B & W Cafeteria is not a place of public accommodation covered by the Act. It assumes the contrary (State's Brief, p. 5), as South Carolina and Arkansas did in the *Hamm* case (379 U. S. at 309-310).[3]

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[2] §203(c) provides:

"No person shall . . . (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by Section 201 or 202."

See also §§201(b)(2) and (c)(2) of the Civil Rights Act of 1964.

[3] The correctness of this assumption is clear, since it is uncontradicted that the cafeteria was open to the general public (R. 94), and hence "offers to serve interstate travelers." Section 201(c)(3), Civil Rights Act of 1964. The indictment alleged that the B & W Cafeteria Inc., was "a restaurant and cafeteria, elaborately furnished and equipped, . . . in the heart of the business, commercial and uptown district of Nashville, Tennessee, . . . with a large seating capacity for customers . . . [and a] reputation as serving

Second, it is undisputed that petitioners sought and were denied enjoyment of the goods and services of the cafeteria solely because of their race; the cafe manager (among others) flatly testified to this (R. 94-95). The State's present assertions that this is not a case involving racial discrimination are so patently contrary to the evidence, the indictment, the State's own theory at trial, and the proceedings at every stage of the trial as to be unworthy of serious consideration.[4] Time and again states have made such arguments to this and other courts, but only rarely has it been attempted on a record so permeated with the race question from first page to last on the State's own theory of the trial.[5] The claim is all the more bizarre in this case where the law used to convict petitioners was admitted candidly by a contemporary Tennessee Supreme Court to have been "an extraordinary statute" "passed to avoid the supposed effects of an act of Congress on the same subject, known as the civil rights bill" of 1875. *State* v. *Lasater*, 68 Tenn. 584, 585 (1877).[6]

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fine foods and which said cafeteria daily served hundreds of white patrons, customers and clientele (R. 2). The manager testified that "adjacent and nearby" businesses were a jewelry store, a furrier, the Eastern Airlines office, the Cross Keys Restaurant and the Hermitage Hotel (R. 89); and that the capacity is 450 customers (R. 88).

[4] See, for example, R. 1-5.

[5] In a celebrated case where the pretense of racial neutrality was maintained from the start, Judge Wisdom of the Fifth Circuit wrote that it "was tried below and argued here in the eerie atmosphere of never-never land." *Meredith* v. *Fair*, 298 F. 2d 696, 701 (5th Cir. 1962); see also, *Meredith* v. *Fair*, 305 F. 2d 343, 345 (5th Cir. 1962).

[6] The indictment charged petitioners, among other things, with a conspiracy to violate Tenn. Code Section 62-711. It also mentioned Section 62-710. Petitioners argue (see Part IV, *infra*) that the jury was erroneously instructed that they were charged with violating this law as well. Sections 62-710 and 62-711, respectively, were originally sections 1 and 2 of the Act which may be found

Thirdly, in conjunction with the new posture of racial neutrality, the State argues that the *Hamm* case is inapplicable because, it is asserted, petitioners did not behave in a "peaceful manner" and their conduct is unlawful without regard to the race issue (State's Brief, p. 5). There are multiple answers to this contention. They may be summarized by stating that the record and a reasonable construction of the Civil Rights Act of 1964 do not support the assertion, and that in any event, considering the accusation, jury instructions and evidence, the jury's general verdict does not necessarily, or even probably, indicate that the jury believed that petitioners were not "peaceful."

We submit that the record demonstrates that the conduct of petitioners was within the statement in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311, that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution." Needless to say, this Court is not bound by the State Supreme Court's characterizations of the facts or prevented from making its own "independent examination of the whole record" in deciding the federal claim. *Edwards* v. *South Carolina*, 372 U. S. 229, 235; *Blackburn* v. *Alabama*, 361 U. S. 199; *Pennekamp* v. *Florida*, 328 U. S. 331, 336.

Such an examination shows clearly the following. Petitioners sought entry to the B & W Cafeteria on October 21, 1962. They attempted to go into the cafeteria, but were prevented from doing so because the doorman blocked en-

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in Acts of Tenn., 39th Gen. Assembly, 1875, Ch. 130, pp. 216-217 (passed March 23, 1875; approved March 24, 1875). There have been only minor changes since the original enactment: (a) the parenthetical phrase—"(except railways, street, interurban and commercial)"—was added to section 1; (b) minor stylistic changes in both sections.

The Act was an immediate response to the federal Civil Rights Act of 1875 which was approved March 1, 1875 (18 Stat. 335).

trance through the inner doors of the vestibule (R. 271, 100-101, 228-229). Clearly they would have gone in and obtained service if they had been allowed to do so (R. 94, 100-101, 289-290).[7] The record is completely devoid of any evidence that petitioners had planned, or wished, to block the entrance. Therefore, this case is certainly not one of a deliberate obstruction of an entry way in order to disrupt business. Any obstruction or inconvenience to white customers was incidental to their unsuccessful demand for service.

Indeed, all the evidence supports the conclusion that the real cause of the obstruction of the doorway was the doorman's refusal to allow petitioners to move out of the vestibule and into the cafeteria (R. 100-101, 165, 228-229). Petitioners allowed numerous customers to pass by them, conduct not compatible with a deliberate scheme to interfere with the B & W's business (R. 91-93, 109, 164). Even the evidence that petitioners were "pushing and shoving" (R. 168, 169, 214, 278-280) is explained largely by testimony that this was caused in part by white patrons coming through the crowded vestibule (R. 175-177, 279-280). There was nothing more than the casual jostling normally encountered in crowded public places. Petitioners could have forced entry if they had wished, considering the age and size of the doorman (see Petitioners' Brief, p. 6), but as the doorman admitted, they did not try "to fight their way in" (R. 228). It would be hard to think of an example of a non-forcible attempt to gain entry, if this is not one. Petitioners standing at the door represented the only way open to them at the time to nonviolently request service.

[7] Even the testimony of witnesses that one of petitioners said, "When we get there, just keep pushing. Do not stop. Just keep on pushing," indicates that they wished to go into the cafeteria, and did not want to prevent others from doing so (R. 210-211, 219-222).

If admitted they would have purchased food. The cafeteria employees' conduct prevented them from ordering food.

Examining the occurrences as if they had taken place after enactment of the Civil Rights Act of 1964 illuminates the problem. The restaurant employees would obviously violate their duties under the Act by blocking petitioners' entry. By standing in the vestibule and thus continuing to seek entry, petitioners, asserting rights under the Act, might by their presence make it more inconvenient for white customers to enter. But surely the policy of the Civil Rights Act would prevail over any incidental inconvenience to customers coincident with and directly flowing from wrongful action of the restaurateur in defiance of the Act. We submit that this is exactly the type of situation Vice President (then Senator) Humphrey envisioned when he explained that the bill meant that "a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State courts must entertain defenses grounded upon these provisions . . . " (Cong. Rec., May 1, 1964, p. 9463; and see *Hamm, supra,* 379 U. S. at 311). A contrary holding would invite nullification of the Act by hostile prosecutors and fact finders. And, of course, this does not mean that the Act affords a shield for really violent conduct, any more than it was ever suggested by courts which supported the view that proprietors could exclude for racial reasons that the right of self-help excused such violence by restaurateurs.

However, even if the foregoing analysis is not accepted, that is by no means the end of the matter because in light of the manner in which the case was presented to the jury, the general verdict of guilty does not indicate that the jury believed that petitioners were not acting in a peaceful, nonviolent manner. (Matters pertinent to this are argued ex-

tensively below in connection with the arguments about the trial judge's instruction to the jury and the nature of the indictment.) Indeed, the jury could have followed its instructions and nevertheless convicted if it merely believed that petitioners tacitly agreed to challenge the proprietor's right to exclude Negroes,[8] or that they tacitly agreed to seek service nonviolently but knowing that they ran the risk of being attacked by white bystanders or patrons.[9] Surely the case was never presented to the jury with instructions to determine merely whether petitioners used violent means or deliberately blocked the door to assert their own lawful right to enter against a proprietor who was lawlessly excluding them. The case was presented to

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[8] The judge read Section 62-710, conferring a right to exclude Negroes (R. 298); read the indictment which embraced that theory (R. 292-296); told incorrectly that the petitioners were charged with violating Section 62-710 on three separate occasions (R. 299, 302, 305); and also told (in defining acts "injurious" to restaurant trade or business as used in the conspiracy statute (§39-1101(7)) that injurious "generally means in law, invasion or violation of legally protected interest or property right of another" (R. 300).

(Note that the court refused to give requested instructions that the restaurant had no right to exclude racially (R. 310). What is more it also deleted the key language of another requested instruction that might have made it clear that petitioners' mere agreement to seek entry even though the cafeteria had a policy of refusing to serve Negroes was not unlawful. Compare requested instructions at R. 307 (deleted language in brackets) with actual instruction at R. 311.)

[9] The indictment, which was read with approval to the jury during the instructions by the Court contained an allegation that defendants did certain acts "well knowing that their presence as 'sit-ins' was likely to promote disorders, breaches of the peace, fights or riots *by patrons, customers and clientele of such segregated cafeteria*" (R. 295, emphasis supplied). The indictment also asserted that previous sit-ins had "resulted in fights, breaches of the peace, disorders, brawls and riots" (R. 295). This invited conviction on a theory, obviously unconstitutional under *Garner* v. *Louisiana*, 368 U. S. 157, and *Wright* v. *Georgia*, 373 U. S. 284, 292, that petitioners' acts were unlawful because they knew that others might attack them.

the jury on precisely the opposite basis, by a jury charge which included a reading of the indictment and Code Section 62-710 with approval of the legal theories therein (R. 292-296, 298, 300, 302, 305). To view the matter another way, and make it more than obvious, no one could reasonably contend that the indictment or charge to the jury were proper if they had taken place after passage of the Civil Rights Act of 1964. Any conviction after enactment of Title II that was based on such an accusation or such a jury instruction would be summarily reversed. The pre-act conviction based on such a case falls by the same token because based on a general verdict arrived at by a jury erroneously instructed as to the law.

II.

Petitioners' Convictions Were an Enforcement of Racial Discrimination by State Action in Violation of the Fourteenth Amendment.

The State's brief makes no attempts to give a direct answer to petitioners' arguments based on the Fourteenth Amendment. However, a few additional remarks are appropriate.

Tennessee has by its laws and administrative regulations directly encouraged and required segregation in violation of the principles set forth in *Lombard* v. *Louisiana*, 373 U. S. 267; *Peterson* v. *Greenville*, 373 U. S. 244; *Robinson* v. *Florida*, 378 U. S. 153; and *Fox* v. *North Carolina*, 378 U. S. 587.

First, we have mentioned above that the laws used to convict petitioners were passed by Tennessee in 1875 in an attempt to evade the Civil Rights Act of 1875 dealing with

public accommodations.[10] The judicial acknowledgment of this is corroborated by the fact that the Tennessee law paraphrased in exactly the same order the categories of accommodations covered by the federal act passed that same month.[11] This was certainly an admitted state encouragement of racial discrimination in restaurants, which are expressly mentioned in the act's second section (now §62-711). But beyond this the State has taken administrative action to *require* segregation, as was brought to this Court's attention in *Turner* v. *Memphis*, 369 U. S. 350, 351. The *Turner* case involved Regulation No. R-18(L) of the Division of Hotel and Restaurant Inspection of the State Department of Conservation providing:

> Restaurants catering to both white and negro patrons should be arranged so that each race is properly segregated. Segregation will be considered proper where each race shall have separate entrances and separate facilities of every kind necessary to prevent patrons of the different races coming in contact with the other in entering, being served, or at any other time until they leave the premises.[12]

Violation of this regulation was a misdemeanor punishable by fine pursuant to Tennessee Code Section 53-2120.

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[10] See Note 6 above and accompanying text. *State* v. *Lasater*, 68 Tenn. 584, 586 (1877).

[11] This is also a repudiation of the assumption made in *The Civil Rights Cases*, that common law protected access to places of public accommodation, but although a Tennessee case was involved the law apparently passed unnoticed by the court (109 U. S. 3, 24). After the *Civil Rights Cases, supra*, Tennessee grew bolder and explicitly declared the right to segregate in certain places of public accommodation. See Tenn. Code Ann. Section 62-715 (derived from Acts 1885, ch. 68, §4).

[12] The quotation of the regulation is taken from the printed record in this Court in *Turner* v. *Memphis*, 369 U. S. 350, Oct. Term, 1961, No. 84, Record pp. 7, 19-20.

To be sure, the above-mentioned statute and regulation were held unconstitutional in *Turner* v. *Memphis*, 369 U. S. 350, 353 (March 26, 1962), some 7 months before petitioners in this case were arrested. However, petitioners submit that the provisions represent such a clear and unequivocal state endorsement of the desirability of segregation as to be at least the legal equivalents of the invalid state encouragement of segregation in *Robinson* v. *Florida*, 378 U. S. 153, and *Fox* v. *North Carolina*, 378 U. S. 587. Indeed, even the segregation ordinance involved in *Peterson* v. *Greenville* was clearly a nullity at the time the arrests in that case took place under the same precedents cited for invalidating the Tennessee provisions in *Turner* (369 U. S. at 353).

III.

Petitioners Were Convicted on a Record Containing No Evidence of Guilt Contrary to *Thompson* v. *Louisville*, 362 U. S. 199.

It is submitted that the State has not sufficiently rebutted petitioners' argument that there was no evidence sufficient to find them guilty of a conspiracy to violate the statutes mentioned in the indictment. The argument that there is no evidence supporting the charge that they conspired to obstruct the restaurant unlawfully has been detailed in the plaintiffs original brief and in part I of this brief above. However, it should also be emphasized that there was no evidence of a conspiracy to commit "turbulent or riotous conduct."[13] The Court below defined "riotous" by refer-

[13] It should be noted that the conspiracy conviction carried with it a jail term as well as a fine, penalties much more severe than those for a simple violation of Section 62-711. But *State* v. *Lasater*, 68 Tenn. 584, 586 (1877) the Court said that the penalties in §62-711 itself were "severe, more so than in other kindred offenses" but overturned a trial court decision that the $100 fine and $500 forfeiture under the act were a cruel and unusual punishment.

ence to the dictionary as "having the nature of a riot or disturbance of the peace" (R. 319).[14] In the same paragraph the court relates this to the problem of proving a conspiracy. There was plainly no evidence in the case that any actual riot occurred or that there was any breach of the peace. The Court's conclusion that petitioners' conduct met its definition might have adopted the unconstitutional theory in the indictment (R. 4), that petitioners' actions might have provoked an attack by others.[15] Cf. *Wright* v. *Georgia*, 373 U. S. 284, 292-93. Otherwise there is no evidence that the petitioners conspired to cause a riot. Petitioners raised both the "no evidence" and a vagueness claim (R. 17-18, 21, 22, 25) expressly relying on the Fourteenth Amendment.

IV.

Petitioners Were Substantially Prejudiced by the Trial Judge's Erroneous Instructions to the Jury Concerning §62-710 of the Tennessee Code.

The State contends that the Trial Judge's error in the charge to the jury was "in the nature of a typographical or clerical error as obvious to the jury as to counsel for the petitioners" and hence was harmless (State's Brief, pp. 13-14).

The suggestion that the trial judge's error was a mere inadvertence comparable to a slip of the tongue is readily subject to refutation. To start with the judge did not

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[14] In *State* v. *Lasater*, *supra*, the only prior construction of the law that has come to our attention, the law was held applicable to an allegation that a defendant engaged in "quarreling, committing assaults and batteries, breaches of the peace, loud noises, and trespass upon a hotel."

[15] See Note 8 *supra*.

merely tell the jury once that petitioners were charged with conspiring to violate §62-710. He told them this three times. In addition, he not only read the statute to the jury, he also read the grand jury presentment which relied on the statute and indeed made a variety of references to restaurateurs' purported right to exclude Negroes. The harmful potential of this coupled with the instruction that a conspiracy under the law included injury to a "legally protected interest or property right" (R. 300) is patent. The fact that the trial judge denied contrary instructions also shows that the error was not an inadvertence.

We submit that the instructions under §62-710 could have led a jury of laymen to believe that they could find petitioners guilty solely because they sought to induce the cafeteria to serve them by nonviolently challenging its segregation policy established pursuant to §62-710. The Court below said "the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section" (R. 321). That is exactly what was wrong with reading the statute to the jury. It asserted that the proprietor's racial policy was valid and relevant—a theory, incidentally at odds with the pretense that race was not involved in the case.

The emphasis on §62-710 in the indictment and jury charge is at the heart of the invitation to the jury to decide the case on a variety of unconstitutional grounds such as those mentioned in the text accompanying notes 7 and 8 above. This requires reversal of the convictions under *Stromberg* v. *California*, 283 U. S. 359.

The State also argues that petitioners failed to object when the instruction was given, and cites the case of *Palmer* v. *Hoffman*, 318 U. S. 109, 119-120. However, the decision

there involved and turned on a rule of federal procedural law, and is therefore inapplicable. Neither the Supreme Court of Tennessee (R. 321) nor the State in its brief (pp. 13-14) pointed to any Tennessee authority that would establish that petitioners failed to raise the issue properly by requesting a contrary instruction,[16] followed by citing the erroneous instruction in its motion for a new trial (18-19).[17] Moreover, the Tennessee Supreme Court only mentioned that no questions were raised about the propriety of reading the section, and then proceeded to decide on the merits that the error was harmless. Quite possibly the Court thought that this passing mention supported its harmless error holding and intended no procedural implication at all. Since the state court, if it considered the matter procedurally, exercised an apparent discretion to decide the issue, there is no reason for this Court to decide that it is barred

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[16] See R. 310. Defendants' Special Request No. 4 sought to have the jury instructed that Section 62-710 could not constitutionally form the basis of enforcing a policy of racial segregation or exclusion through a criminal action.

Apparently, under Tennessee law the requesting of an instruction in opposition to the one given is a sufficient objection. Cf., *Arterburn* v. *State*, 208 Tenn. 141, 344 S. W. 2d 362 (1961); *Crawford* v. *State*, 197 Tenn. 411, 273 S. W. 2d 689 (1954); *Powers* v. *State*, 117 Tenn. 363, 97 S. W. 815 (1906).

Moreover, the appellate courts do have discretion to rule on the validity of an instruction even where no contrary request has been made. See, *Potter* v. *State*, 85 Tenn. 88, 1 S. W. 614 (1886); *King* v. *State*, 83 Tenn. 51 (1885). This is particularly the case where the judge's error has been an *affirmative* one, as was the case here. Thus, in *Burgess* v. *State*, —— Tenn. ——, 369 S. W. 2d 731 (1963) the trial judge had charged the jury by reading them the language of a statute that had been passed after the defendant had committed the offense. The Supreme Court of Tennessee reversed, even though no special request for a different instruction, or apparently any other objection, had been made. Thus, under the rule of *Williams* v. *Georgia*, 349 U. S. 375, this court is not barred from deciding the question.

[17] The record does not indicate what, if any, other opportunities were given petitioners to object to the erroneous instruction.

from also determining the question.[18] *Williams* v. *Georgia*, 349 U. S. 375; *Shuttlesworth* v. *City of Birmingham*, 376 U. S. 339.

V.

Petitioners Were Denied Due Process Because the Appellate Review of Their Convictions Did Not Conform to the Rule of *Cole* v. *Arkansas*, 333 U. S. 196.

Petitioners have argued that the appellate review afforded below did not conform to due process because their convictions were not appraised "on consideration of the case as it was tried and as the issues were determined in the trial court." *Cole* v. *Arkansas*, 333 U. S. 196, 202. The State has replied that the Tennessee Supreme Court found an independent ground to support the judgment even assuming, as petitioners contended, that the racial policy of the cafeteria was illegal, and that in so holding the state court merely followed the usual appellate principle of avoiding the unnecessary decision of constitutional questions. The State relies on *Garner* v. *Louisiana*, 368 U. S. 157, and *Hormel* v. *Helvering*, 312 U. S. 551.

We submit that neither the reasoning nor the authorities[19] cited by the State refute petitioners' argument that the ap-

[18] See Note 16 *supra*. In addition, *Stromberg* v. *California*, 283 U. S. 359, and *Terminiello* v. *Chicago*, 337 U. S. 1, indicate that even if there had been a failure to properly object, this would not bar the challenging of an erroneous instruction where the error was sufficiently prejudicial.

[19] *Garner* v. *Louisiana*, 368 U. S. 157, was a case where the Court reversed convictions and freed convicts, finding it unnecessary to reach all their claims. This is a quite different matter from sending men to jail without deciding their properly presented constitutional claims by seizing on a theory directly contrary to that upon which the jury was instructed to decide the case.

Hormel v. *Helvering*, 312 U. S. 552, was a civil tax case where the Court recognized the general rule that appellate courts should not consider issues never raised below in order that parties may

pellate court unfairly sustained their convictions on a ground not litigated.

The Tennessee Supreme Court said that: "Stripped of any question of race and discrimination, the act complained of is still unlawful" (R. 324). Aside from the fact that one must disregard the facts to strip the case of race issues, the problem with this is that the jury never considered the facts "stripped of any question of race and discrimination," and the defense never had notice of or opportunity to defend against any such charge. The issues of whether petitioners used illegal means to enter a place they had a right to enter was never put before the jury, and was not fairly presented by the indictment. It was decided by the Supreme Court of Tennessee in the first instance. Thus petitioners were convicted "upon a charge not made" a "sheer denial of due process" *DeJonge* v. *Oregon*, 299 U. S. 353, 362.

Cole v. *Arkansas*, 333 U. S. 196, 201, emphasizes that notice of the specific charge and a right to be heard at trial of the issues raised by the charge is essential to a fair trial. If petitioners had notice of this quite different charge, their cross-examination and argument might have been different. Indeed, faced with such a charge defense counsel might have evaluated the risks differently and found it prudent to call on the defendants to testify in their own defense. This determination alone can vitally affect the outcome of a trial.[20] As the charge was actually framed,

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have an opportunity to offer evidence on the relevant issues. But recognizing that the rule was not inflexible, the Court found that in the particular case an injustice would result if the case was not decided on the basis of the correct rule of law as embodied in statute not mentioned before the Board of Tax Appeals. We submit that in this case the failure to apply the *general rule* stated in *Hormel, supra*, has resulted in an injustice to petitioners whose liberty is at stake.

[20] A defendant's failure to testify obviously may have an impact on the jury even if it is admonished not to hold his failure against him.

and the case actually tried the tactical considerations for defense counsel were quite different because the state's case at trial flatly rested on the premise that state judicial enforcement of racial segregation did not violate the Fourteenth Amendment. Defense counsel might very reasonably stake the defense on the belief that this proposition was wrong (Cf. *Lombard* v. *Louisiana*, 373 U. S. 267; *Robinson* v. *Florida*, 378 U. S. 153; and the concurring opinions in *Bell* v. *Maryland*, 378 U. S. 226), but they might well have taken an entirely different view of defense tactics and put on defensive proof if faced with a charge that the defendants used illegal means of self-help in support of a lawful right to enter the premises.

In *Russell* v. *United States*, 369 U. S. 749, 766 the Court made it clear that the reasoning of *Cole* v. *Arkansas*, *supra*, was not limited to the case where an appellate court explicitly switched statutes on a defendant.[21] In reversing because of a vague indictment the court said (369 U. S. at 766):

> "It enables his conviction to rest on one point and the affirmance on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture. The Court has had occasion before now to condemn just such a practice in a quite different factual setting. *Cole* v. *Arkansas*, 333 U. S. 196, 201, 202."

In *Garner* v. *Louisiana*, 368 U. S. 157, this Court rejected a request that it do something similiar to what was done by the Tennessee Court. Louisiana argued that although defendants were convicted of disorderly conduct, the real issue was whether the record proved the elements of a criminal trespass. The Court rejected the argument on the authority of *Cole*, *supra*. *Garner* v. *Louisiana*, 368 U. S. 157, 164.

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[21] This occurred in *Shuttlesworth* v. *Birmingham*, 376 U. S. 339.

Here the Tennessee Supreme Court convicted the defendants on a charge that the trial jury never considered and which the grand jury never made. *Cole* v. *Arkansas, supra; Stirone* v. *United States,* 361 U. S. 212.

The prosecution thus attempts, we think unfairly, to get the benefit of the emotionally charged segregation issue before a favorably disposed jury (see Argument VI, *infra*), while attempting to cleanse the case of the race issue for review in this Court, in the face of adverse precedent (*Hamm* v. *Rock Hill,* 379 U. S. 306).

VI.

Petitioners Were Denied Due Process Because the Jury Which Convicted Was Not Impartial or Indifferent on a Central Matter Presented to the Jury.

Petitioners have argued from the very beginning that they were denied due process because the jury which tried them was prejudiced against them as evidenced by the jurors' admitted life-long practice, custom and philosophy of racial segregation.[22] The relationship of this point to the objection to the indictment and its references to the cafeteria's segregation policy under Section 62-710 was pointed out to the trial court during the jury selection process (R. 59-60, 63).

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[22] Only a portion of the lengthy *voir dire* proceedings to select the jury have been printed in the record in this Court (R. 29-87), however, the entire original record in typewritten form is on file in this Court. In addition to the general objection, the motion for new trial (R. 24-25) raised particular objections to jurors Wm. T. Moon, Wendell H. Cooper and Herbert Amic, reiterating objections made during the *voir dire* itself. Moon and Cooper were seated after all of petitioners' peremptory challenges were exhausted; others were seated over petitioners' protests that challenges for cause were improperly denied though they declined to use their limited number of peremptory challenges.

The State's brief in this Court argues first, that there was no showing that the jurors were prejudiced about an issue that was involved in the case, and second, that the jurors stated that their opinions were not so fixed that they could not try the case impartially.

The State's first point is patently erroneous. The case was presented to the jury by the indictment and the judge's instructions as a case centrally concerned with the question whether petitioners conspired to deprive the cafeteria of its explicitly assumed right to exclude Negroes. The case was submitted to the jury on an instruction exactly contrary to the *arguendo* assumptions made by the Tennessee Supreme Court, and the ruling of *Hamm* v. *Rock Hill,* 379 U. S. 306, *i.e.,* that petitioners had a right to service and the proprietor no right to exclude them. Note that the jurors' prejudice was not a mere "mistake of law" as urged by the state; their prejudice was about what the law *should be* and their view was that restaurants should be allowed to discriminate racially. The prejudice was expressed in these terms by juror Amic, and was plainly implicit in the testimony of the others who believed in and practiced segregation in every area of their daily lives.

But this Court has held that "the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin* v. *Dowd,* 366 U. S. 717, 722. The fair jury is a basic requirement of due process. In *Irvin* the Court quoted with approval Lord Coke who said "a juror must be as 'indifferent as he stands unsworne' Co Litt 155b" (366 U. S. at 722)

In answer to the state's second point, *Irvin* v. *Dowd, supra,* makes it plain that while it is sufficient that a juror can lay aside his impression or opinion and render a verdict on the evidence, this rule does not foreclose inquiry even if every juror says that notwithstanding his opinion

he can render an impartial verdict, and holds that "impartiality is not a technical conception" (366 U. S. at 723-724). In *Irvin* the Court held the trial unfair because a variety of evidence such as newspaper comment and reporting of the crime demonstrated a "pattern of deep and bitter prejudice against" the defendant (*Id.* at 727). The evidence of the pattern of segregationist belief in this case came from the jurors and veniremen themselves, as one after another the white jurors expressed this view and every Negro juror was either excused for cause or peremptorily challenged by the state.

Juror Amic, after telling the Court that he could be impartial (R. 61-62) practically returned to his earlier expression (R. 62):

> Q. Wait just a minute—please, sir. That if evidence was shown in this case—that if the indictment charges that the defendants went there, knowing of this rule and the defendants, being Negroes, sought service, that it would prejudice you against them?
>
> A. Well, it would have to be shown to me that it was—that they did violate some regulation like that.
>
> • • • • •
>
> Q. But, if they had a rule that they excluded Negroes, and these defendants went there and violated that rule, it would prejudice you against these defendants, wouldn't it?
>
> A. If—if it was a proven fact that that was their rule, and that they were there against the cafeteria's rule, why I think they have a right to enfore (sic) that rule.
>
> Q. And you would start out with that prejudice against the defendants, wouldn't you?
>
> A. Not necessarily, not until it is proven exactly they did violate the rule and violate some law.

In particular it was argued that juror Herbert Amic was erroneously held competent, despite petitioners' objections, after testifying that he believed a business open to the public should be allowed to exclude Negroes; that in such a case he would start out with a prejudiced attitude toward the petitioners; and that the cafeteria would be right in its position (R. 56-57).

Petitioners were denied a jury which was "impartial" and "indifferent" on the principal issue presented to it for decision by the instructions and indictment. It is reasonably inferable that the prosecutor prepared the indictment emphasizing race in order to exploit the segregationist attitudes of local jurors. The state may not now avoid the consequences of that decision.

Respectfully submitted,

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No. 148

IN THE

SUPREME COURT OF THE UNITED STATES.

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF

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IN THE

SUPREME COURT OF THE UNITED STATES.

LESTER G. McKINNIE, NATHAL WINTERS, JOHN R. LEWIS, HARRISON DEAN, FREDERICK LEONARD, ALLEN CASON, JR., JOHN JACKSON, JR., and FREDERICK HARGRAVES,
Petitioners,

v.

STATE OF TENNESSEE,
Respondent.

REPLY BRIEF

For the State of Tennessee.

MAY IT PLEASE THE COURT:

OPINION BELOW.

The petitioners in this cause were convicted for a conspiracy to injure the business of the B & W Cafeteria, Nashville, Tennessee, by blocking the entrance to the restaurant in violation of Section 39-1101, Tennessee Code Annotated, which provides, inter alia, that the crime of conspiracy may be committed by two or more persons conspiring to commit an act injurious to trade or commerce for a violation of Section 62-711, Tennessee Code Annotated, which provides that any person found guilty

of turbulent or riotous conduct about a restaurant and other places of public accommodation may be punished by a fine of not less than $100.00 nor more than $500.00. A violation of Section 39-1101, Tennessee Code Annotated, constitutes a misdemeanor and is punishable by a fine of not more than $1000.00 and confinement in the county jail or workhouse for not more than one year. The punishment for the petitioners in this case was fixed at ninety days in the workhouse and a fine of $50.00.

The conviction was affirmed by the Supreme Court of Tennessee, and is reported as set out in petitioners' brief, ... Tenn., ..., 379 S. W. 2d 214, Petition to Rehear, ... Tenn., ..., 379 S. W. 2d 221.

JURISDICTION.

Counsel for the Respondent, State of Tennessee, admits the jurisdiction of this Honorable Court to review the opinion of the Supreme Court of Tennessee under the writ of certiorari granted October 12, 1964.

QUESTIONS PRESENTED.

Counsel for the petitioners insist in their petition for writ of certiorari that the case requires the determination of six questions of law but in their brief they list seven questions to be determined. Counsel for the Respondent states the substance of these two sets of questions for determination as follows:

(1) Whether or not the Civil Rights Act of 1964 invalidated the State statutes under which the petitioners were convicted (Question 3, Brief and 1 and 2, Petition).

(2) Whether or not the evidence preponderates against the conviction for unlawful conspiracy and in favor of the innocence of the accused (Question 4, Brief and Question 3, Petition).

(3) Whether or not the Supreme Court of Tennessee sustained petitioners' conviction upon a basis not litigated in the trial court (Question 5, Brief and Question 4, Petition).

(4) Whether or not the trial judge's erroneous instruction to the jury that they return a verdict of guilty if they found petitioners violated Section 62-710, Tennessee Code Annotated, which authorizes the owners of restaurants and other places of public accommodation to exclude any person for any reason they desire materially affected the verdict of the jury (Question 5, Brief and Question 5, Petition).

(5) Whether or not the petitioners were tried before a fair and impartial jury in view of the fact that some on voir dire stated that owners of places of public accommodation should be allowed to exclude Negroes if they wished (Question 7, Brief and Question 6, Petition).

STATEMENT OF THE EVIDENCE.

In addition to the statement of the evidence contained in the petition and brief in support thereof, counsel for the Respondent insists that the following statement of evidence also be considered (All page references are to the printed copy of the transcript).

The petitioners appeared at the entrance of the B & W Cafeteria, Sixth Avenue, Nashville, Tennessee, about 12:00 p. m., Sunday, October 21, 1962 (Tr. 88-89) at a time when the entrance was crowded because of people arriving for lunch after being dismissed from church (Tr. 269-270). After being informed by Otis Williams, who was employed by the cafeteria as a doorman that the cafeteria did not serve colored people and that they could not enter, the petitioners insisted, "We are coming in and going to eat when we git in" (Tr. 270-272).

Petitioners were asked to move along and not to make any trouble for the restaurant, but they remained in the vestibule area, approximately 4 feet by 4 feet. The doorman testified that the vestibule was 6 feet by 6 feet four inches (Tr. 270-271). Only a few people managed to squeeze through the vestibule (Tr. 91). The City Policemen were called and they escorted the petitioners away from the entrance (Tr. 92), after they refused to leave otherwise (Tr. 248-249).

One of the State's witnesses described the situation as follows:

> "Well, it was still blocked and people inside couldn't get out. And you could see the crowd outside—wasn't coming in. And it just seemed like an awfully long time till the—under the circumstances—it wasn't too long—while that state of confusion existed. And the police came and then they—it was a question of what to do then. I was talking to some of the policemen, and I was a lawyer, and they thought I knew everything and could solve the situation, and I must admit that I didn't know what to do myself" (Tr. 188).

This same witness testified that after the vestibule of the restaurant was cleared, the crowd inside the restaurant went out and the crowd outside the restaurant entered (Tr. 191-192).

ARGUMENT.

I.

This Honorable Court in **Arthur Hamm, Jr. v. City of Rock Hill,** and **Frank James Lupper et al. v. State of Arkansas,** 33 U. S. L. Week 4079, December 15, 1964, said:

> "We hold that the convictions must be vacated and the prosecutions dismissed. The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage."

If the attempts made by the petitioners in this case to obtain service in the B & W Cafeteria on equal basis with all other persons can be characterized as peaceful attempts, of course, these convictions must be abated. Counsel for the Respondent insists that the attempts made by the petitioners in this case to obtain service at the restaurant in question were not peaceful attempts. The indictment alleges in effect that the petitioners conspired to block by use of physical force the entrance to the cafeteria in question and prevent patrons inside from leaving and those outside from entering the cafeteria (Tr. 4-5). The trial jury found the protest of the petitioners not to have been made in a peaceful manner. This was also the conclusion of the trial judge and the Supreme Court of Tennesee as evidenced by their approval of the jury verdict.

This Honorable Court in **Feiner v. People of State of New York,** 340 U. S. 315, 71 S. Ct. 303, 95 L. Ed. 295, found very similar conduct not to be peaceful as indi-

cated by the following excerpt taken from 340 U. S. 320, 71 S. Ct. 306, 95 L. Ed. 300:

> "The language of Cantwell v. State of Connecticut, 1940, 310 U. S. 296, 60 S. Ct. 900, 84 L. Ed. 1213, is appropriate here. 'The offense known as breach of the peace embraces a great variety of conduct destroying or menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.' 310 U. S. at page 308, 60 S. Ct. at page 905. The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police requests, supported as they are by the record of this case, are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper state police action. This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. Schneider v. State of New Jersey, Town of Irvington, 1939, 308 U. S. 147, 160, 60 S. Ct. 146, 150, 84 L. Ed. 155; Kovacs v. Cooper, 1949, 336 U. S. 77, 82, 69 S. Ct. 448, 451, 93 L. Ed. 513. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner."

It must be remembered, as I know that this Honorable Court will remember, that it is the conduct of the peti-

tioners in question here rather than the conduct of the owner of the cafeteria involved, and the suggestion in argument of counsel for the petitioners to the effect that if the conduct of the restaurant owner was made unlawful, if not before, by the enactment of the Federal Civil Rights Act of 1964, the petitioners' conviction should be reversed or abated without regard to whether or not they sought to obtain rights to which they were entitled by unlawful means or acts contrary to constitutional penal statutes of this State, should be disregarded. It is noted in the majority opinion of **Arthur Hamm, Jr., and Frank James Lupper**, supra, that the legislative history of the Civil Rights Act indicates that the Act would be a defense to criminal trespass, breach of the peace, and similar prosecutions, citing Senator Humphrey in the Congressional Record, May 1, 1964, pages 9162-9163 (U. S. L. Week 4080, December 15, 1964). After noting the legislative history of the Act, it was said that the Act prohibits the application of State laws in a manner that would deprive persons of rights granted under the Act. The case does not hold that it was the intent of the Act for individuals or groups of individuals to take the law in their own hands when rights to which they were entitled were denied. As a matter of fact, one of the significant secondary purposes of the Act was to remove conflicts resulting from the denial of civil rights to people because of race or color from the streets into the courtrooms.

Mr. Justice Black in his dissenting opihion had this to say on the subject:

> "I do not understand from what the Court says that it interprets those provisions of the Civil Rights Act which give a right to be served without discrimination in an establishment which the Act covers as also authorizing persons who are unlawfully refused service a 'right' to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay. I think one of the chief pur-

poses of the 1964 Civil Rights Act was to take such disputes out of the streets and restaurants and into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy."

U. S. L. Week 4084, December 15, 1964.

Title II, Section 207 (b), Civil Rights Act of 1964, is as follows:

> "The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

Thus, it appears that in order for a person to obtain his rights declared by the Civil Rights Act that he is limited in his remedies to those provided for in the Act. It certainly does not make these rights dependent upon a particular individual or a group of individuals' superior physical strength or the superiority of weapons available to him or them as the case may be, and it is submitted that the petitioners would not wish their rights to be dependent upon such factors.

II.

It is insisted by counsel for the petitioners that there is no evidence in the record to support the conviction for conspiracy. This insistence as understood by counsel for the Respondent is predicated upon the theories that (1) petitioners may have been found guilty of seeking service in a "white only" cafeteria or for obstructing the entrance to the cafeteria, the first of which was held to be unconstitutional by the State Supreme Court and it might be

that the jury based their conclusion of guilt upon the former since it cannot be determined from their verdict which of the two acts their findings were bottomed; (2) there was no evidence the petitioners were disorderly, that violence was threatened or occurred; (3) there was no evidence of an agreement among the petitioners to obstruct the entrance to the cafeteria; and (4) the conduct of the petitioners in this case was not constitutionally different from their protesting the denial of their rights by sitting quietly on a lunch stool inside the restaurant.

A conspiracy as defined by the Supreme Court of Tennessee in the case in question and other cases is not materially different from the definition adopted by other jurisdictions. In order to constitute a conspiracy, there must be an agreement between two or more persons to do an unlawful act or a lawful act in an unlawful manner, coupled with an overt act in furtherance of the agreement.

In the case of **American Tobacco Co. v. United States**, 328 U. S. 780, 808, 66 S. Ct. 1125, 1139, 90 L. Ed. 1575, 1594, the following language was used regarding a conspiracy:

> "It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effecuate the conspiracy which the statute forbids, they come within its prohibition. No formal agreement is necessary to constitute an unlawful conspiracy. Often crimes are a matter of inference deduced from the acts of the person accused and done in pursuance of a criminal purpose."

Also pertinent is the following excerpt from **Ingram v. United States**, 360 U. S. 672, 679-680, 79 S. Ct. 1314, 1320, 3 L. Ed. 2d 1503, 1509:

> "A conspiracy, to be sure, may have multiple objectives, United States v. Rabinowich, 238 U. S. 78, 86, 35 S. Ct. 682, 684, 59 L. Ed. 1211, and if one of its objectives, even a minor one, be the evasion of federal taxes the offense is made out, though the primary objective may be concealment of another crime."

The foregoing excerpts considered with the circumstances recited above in this case appear to be an adequate reply to the first and third contentions made that a conspiracy was not proven. The second contention to the effect that there was no evidence of violence, disorder, etc., was answered in the reply to the first assignment of error.

The fourth contention to the effect that the conduct of the petitioners in this case is identical in principle to their sitting quietly on a lunch stool inside the restaurant for the purpose of protesting a denial of their rights raises perhaps the ultimate issue in this case. The State submits there is a big difference between the two types of acts. For these eight petitioners to sit quietly in the restaurant and refuse to remove themselves therefrom after being informed they would not be served, would not materially obstruct the management's effort to carry on the business, whereas their blocking the entrance to the building to the extent it was blocked tended to paralyze the operation of the restaurant except for a few customers who were willing to push their way through the petitioners' blockade As stated above, the petitioners' conduct was not peaceful.

The inference to be drawn from the case of **Garner v. State of Louisiana**, 368 U. S. 157, 82 S. Ct. 248, 7 L. Ed.

2d 207, is, that if the petitioners in that case had been disturbing the peace, their conduct would have been unlawful. Peaceful protesting in a case of this type is very analogous to peaceful picketing. Peaceful picketing has been defined in **Goldfinger v. Feintuch**, 11 N. E. 2d 910, annotated 116 A. L. R. 477, and **Senn v. Tile Layers Union**, 301 U. S. 468, 57 S. Ct. 857, 81 L. Ed. 1229. It does not include any form of physical obstruction or interference with business.

III.

The indictment recited that the B & W Cafeteria was operating a restaurant not open to Negroes by authority of Section 62-710, Tennessee Code Annotated. When the case was decided by the Tennessee Supreme Court, it was found unnecessary to determine the validity of this section of the Code and assumed for the purpose of the appeal that it was unconstitutional. Now it is insisted that this amounts to affirming the conviction on a basis not litigated in the trial court. Counsel for the Respondent, State of Tennessee, insists that the Tennessee Supreme Court only found it unnecessary to determine the validity of Section 62-710, Tennessee Code Annotated. This is a practice that is almost universal. In **Garner v. State of Louisiana**, supra, it was found by this Honorable Court that there was no necessity for determining the constitutionality of the Louisiana statute involved because the facts did not bring the case within the purview of the statute.

The recitation in the indictment relative to the policy of the cafeteria, while perhaps not necessary in the indictment, did serve to help show that the petitioners knew they would not be admitted into the cafeteria when they arrived, and is another circumstance tending to show their prior agreement either formal or tacit to commit the conspiracy.

At any rate, the Tennessee Supreme Court found that the conduct of the petitioners under the circumstances was unlawful without regard to whether or not the policy of the cafeteria could legally be supported. On this subject, the Tennessee Supreme Court said in its opinion (Tr. 324), comparing the circumstances with those in the cases of **Peterson v. City of Greeneville**, 373 U. S. 244, 83 S. Ct. 1119, 10 L. Ed. 2d 323; and **Lombard v. State of Louisiana**, 373 U. S. 267, 83 S. Ct. 1122, 10 L. Ed. 2d 339:

> "These two cases are distinguishable from the instant case. The trespass complained of in the Peterson and Lombard cases was the act of sitting on a stool at a lunch counter. This is basically an innocent and unoffensive act. It was only unlawful, in the eyes of the city and state concerned, because of a city ordinance in the Peterson case and an executive directive in the Lombard case, both of which required segregation of the races in public facilities. But absent the governmental mandate and the color of the defendants' skin in those two cases, and the act is basically unoffensive and innocent. This is not so in the instant case. **Stripped of any question of race and discrimination, the act complained of is still unlawful.** In the instant case, if these eight defendants had been white boys, their acts would still have been unlawful. We cannot escape from the fact that these eight defendants were blocking the entrance to the doorway of the B & W Cafeteria. Regardless of who they were and why they were blocking the doorway, their conduct is still basically unlawful" (Tr. 324).

Because of the foregoing, it is insisted that the Supreme Court of Tennessee did not consider a matter not litigated at the trial level but even if such had been the case, there are many instances where cases are decided by appellate courts on issues not discussed or determined at

the trial level. **Elizabethton v. Carter County**, 204 Tenn. 452, 321 S. W. 2d 822; and **Frazier v. Elmore**, 180 Tenn. 232, 173 S. W. 2d 563. See also **Hormel v. Guy T. Helvering**, 312 U. S. 551, 61 S. Ct. 719, 85 L. Ed. 1037, to the effect that the rule should not be applied where an injustice might be caused.

IV.

The trial judge, after reading the indictment to the jury setting out that the petitioners were charged with a conspiracy to commit acts injurious to the trade of the B & W Cafeteria in violation of Sections 39-1101 and 62-711, Tennessee Code Annotated, made reference to a violation of Section 62-710, Tennessee Code Annotated, along with the first two mentioned in the indictment even though the latter was a civil statute relative to the conduct of the business by the owner and a section of the Code which could not have been violated by the petitioners.

The Supreme Court of Tennessee in its opinion said:

> "A careful reading of the indictment and the whole charge shows that the only purpose in referring to this statute was to indicate that this restaurant was being operated for white people only by authority of this section. There were no questions raised following the charge about the propriety of reading it and we do not see how the reference to a civil statute such as this, although error, could affect the jury's verdict, since there was ample evidence to convict the defendants of the offense defined in the other sections of the code charged" Tr. 321.

The trial judge on each of the three occasions in his charge when he referred to the civil section of the Code (Section 62-710, Tennessee Code Annotated), in conjunction with the two criminal sections of the Code indicated that the three sections prohibited acts injurious to the business of the restaurant. The error was, therefore, in

the nature of a typographical or clerical error as obvious to the jury as to counsel for the petitioners. The only thing confusing about the instruction was the use of the number of the Code section, Section 62-710, along with the number of the two sections of the Code defining the offense, a circumstance overcome by the accompanying statement of the essential elements of the offense in each instance.

No objection was made by counsel for the petitioners to this part of the instruction. Because of the nature of the error as revealed by the circumstances cited above, counsel for the Respondent insists that the following rule laid down by this Honorable Court in **Palmer v. Hoffman**, 318 U. S. 109, 119-120, 63 S. Ct. 477, 483, 87 L. Ed. 645, 653, is applicable:

> "Under these facts a general exception is not sufficient. In fairness to the trial court and to the parties, objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error. Where a party might have obtained the correct charge by specifically calling the attention of the trial court to the error and where part of the charge was correct, he may not through a general exception obtain a new trial. See Lincoln v. Claflin, 7 Wall. (U. S.) 132, 139, 19 L. ed. 106, 109; Beaver v. Taylor, 93 U. S. 46, 54, 55, 23 L. ed 797, 798; Mobile & M. R. Co. v. Jurey, 111 U. S. 584, 596, 28 L. ed. 527, 431, 202 U. S. 600, 611, 50 L. ed. 1162, 1168, 26 S. Ct. 709; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 122, 57 L. ed. 1096, 1101, 33 S. Ct. 654, Ann. Cas. 1914C 172; Pennsylvania R. Co. v. Minds, 250 U. S. 368, 375, 63 L. ed. 1039, 1041, 30 S. Ct. 531."

V.

Complaint is made that the petitioners were tried before a jury of white persons who "admitted a firm and life-

long practice, custom, philosophy, and belief in racial segregation" which rendered them disqualified to sit on the case. The record shows that those who were accepted stated that they could disregard their attitude on social questions and perform their duties as jurors on the basis of the evidence and the law (Tr. 32-39, 44-46, 67-68, 74-80, and 81-86).

The first reply to this insistence is that the matter of whether or not the owner of the B & W Cafeteria could constitutionally keep it segregated was not an issue before the jury. It was not made that by the indictment nor the instruction of the trial judge. It was alleged in the indictment as previously stated in this brief to help show the existence of the conspiracy. So, it was never shown that the jurors had formed an opinion on the issue to be tried and consequently, there is no factual basis for this contention.

But on the other hand since the jurors testified they could determine the guilt or innocence of the petitioners fairly on the law and the evidence rather than preconceived opinions, they were qualified. **Kennedy v. State of Tennessee,** 186 Tenn. 310, 210 S. W. 2d 132. See also the following excerpt from **Green et al. v. United States,** 19 F. 2d 850, 855:

> "Error is assigned to the denial of the defendants' challenge of certain of the jurors for actual bias. While it was shown that they had heard about the case, and some of them had formed an opinion as to the guilt or innocence of the defendants, all admitted in substance that it was not a fixed opinion, that it could be disregarded, and that they would endeavor to render a verdict according to the evidence, under the instructions of the court. We think there was no error. Section 331, Washington Compiled Statutes (Remington), provides: 'Although it should appear

that the juror challenged has formed or expressed an opinion upon what he may have heard or read, such opinion shall not of itself be sufficient to sustain the challenge, but the court must be satisfied, from all the circumstances, that the juror cannot disregard such opinion and try the issue impartially.' We are not convinced that there was abuse of discretion in denying the challenge. Spies v. Illinois, 123 U. S. 131, 8 S. Ct. 22, 31 L. Ed 80."

The rule of **Thiel v. Southern Pac. Co.**, 328 U. S. 217, 66 S. Ct. 984, 90 L. Ed. 481, and two other cases cited by counsel for the petitioners to the effect that in both criminal and civil proceedings litigants are entitled to an impartial jury drawn from a cross-section of the community, is not shown to be violated in this case. It is not even insisted that all the members of the jury expressed an opinion that restaurant owners had a right to exclude any person, including Negroes, from their place of business. It is not shown that they were prejudicial at all. The most that is shown is that these jurors were mistaken about the law, or what the law ought to be, which is not unusual among people generally or even among lawyers.

In view of the foregoing, counsel for the Respondent, State of Tennessee, earnestly insists that the judgment of the Supreme Court, State of Tennessee, in this case be affirmed.

Respectfully submitted,

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State of Tennessee,

By THOMAS E. FOX,
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State of Tennessee.

I certify that I forwarded a copy of this Reply Brief for the State of Tennessee to the Honorable Jack Greenberg and the Honorable James M. Nabrit, III, Attorneys at Law, 10 Columbus Circle, New York, New York 10019, and to the Honorable Avon N. Williams and the Honorable Z. Alexander Looby, Attorneys at Law, McClellan-Looby Building, Charlotte at Fourth, Nashville, Tennessee, on this the .... day of ....., 1965.

Thomas E. Fox,
Assistant Attorney General,
State of Tennessee.